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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 210

UNITED STATES OF AMERICA, AS OWNER OF THE S.S. CHRISTOPHER GALE, PETITIONER,

vs.

CHRIS NIELSON, ET AL., CO-PARTNERS TRADING UNDER THE FIRM NAME AND STYLE OF DAUNTLESS TOWING LINE, AS OWNER OF THE TUG DAUNTLESS No. 6

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 13, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

SUPREME COURT OF THE UNITED STATES

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1 In the United States District Court for the Eastern District of New York

DOCKET ENTRIES

Docket No. 18567

Date Month	Day	Year	Filings, Proceedings, etc.
Sept.	23,	1947	Libel & Stip. for costs filed
July	13,	1948	Answer filed for U. S.
July	19,	1948	Note of issue filed
July	19,	1948	Notice of trial filed
Oct.	6,	1948	Inch *J.* Call Cal—Ready
Mar.	3,	1952	Byers Resv Cal—Ready
Mar.	13,	1952	Byers Day Cal Adj to Mch 24/52
Mar.	24,	1952	Byers Day Cal Adj to Apl Term
Apr.	7,	1952	Abruzzo *J.* Day Cal Adj to Apl 10/52
Apr.	10,	1952	Abruzzo *J.* Day Cal Adj to May Term
May	5,	1952	Kennedy *J.* Day Cal Adj to May 12/52
May	12,	1952	Kennedy *J.* Day Cal. Adj to May 26/52
May	26,	1952	Kennedy *J.* Day Cal. Adj to June 9/52
June	9,	1952	Kennedy *J.* Day Cal Settled subject to restoration Adj to Oct 6 for Confirmation of Settlement
Oct.	6,	1952	Abruzzo *J.* Confirmation of Settlement Adj to Oct 27
Oct.	27,	1952	Abruzzo *J.* Confirmation of Settlement Adj to Nov Term
Nov.	17,	1952	Byers *J.* Ordered be restored to day Calendar for trial—Dec Term

2

Dec.	1,	1952	Galston *J.* Day Cal Adj to Dec 17/52
Dec.	17,	1952	Galston *J.* Day Cal. Adj to Jan Term
Jan.	5,	1953	Inch *J.* Day Cal. Adj. to Feb Term
Jan.	19,	1953	Inch *J.* Day Cal. Adj. to Mch Term
Feb.	7,	1953	Interrogatories filed (addressed to respondents)
Feb.	20,	1953	Answers of respondent filed to interrogatories of libellant
Mar.	2,	1953	Abruzzo *J.* Day Cal. Adj to Apl Term
Apr.	6,	1953	Galston *J.* Day Cal. Adj to Apl 15/53
Apr.	9,	1953	Notice to amend filed
Apr.	15,	1953	Galston J. case called Trial began—continued to Apr 16/53
Apr.	16,	1953	Galston *J.* Trial concluded Decision Reserved File Brief May 4 with finding of fact conclusions of law

Date Month	Day	Year	Filings, Proceedings, etc.
Apr.	23,	1953	Minutes of Court filed
May	15,	1953	By Galston, *J.* Findings of Fact and Conclusions of Law filed
May	15,	1953	By Galston, *J.* Opinion rendered. Decree for libellant against U. S. A. Libel against Luckenbach as agent dismissed under the ruling of Supreme Court. (See Opinion)
3			
June	1,	1953	Interlocutory decree and order of reference and entered. Referred to William P. Lage Commissioner. (Galston, *J.*)
June	15,	1953	Notice of Appeal filed (USA)
July	15,	1953	By Byers, *J.* Stipulation & order filed extending time to file record on appeal to September 1, 1953
Sept.	4,	1953	Filed Assignments of Error (U.S.A.)

4 In United States District Court

LIBEL OF CHRIS NIELSON—Filed September 23, 1947

To the Honorable the Judges of the United States District Court for the Eastern District of New York:

The libel of Chris Nielson, et als. copartners trading under the firm name and style of Dauntless Towing Line, as owner of the tug DAUNTLESS #6 against the United States of America, as owner, and Luckenbach Steamship Co., Inc. as charterer and/or agent, of the SS. CHRISTOPHER GALE in a cause of collision, civil and maritime, respectfully alleges on information and belief:

FIRST: At all the times mentioned in the libel libelant was and now is a copartnership trading under the firm name and style of Dauntless Towing Line with an office and place of business at 70 Pine Street, Borough of Manhattan, City, County and State of New York, and at all the times mentioned in the libel was the owner and operator of the tug DAUNTLESS #6.

SECOND: Respondent the United States of America is and all the times hereinafter mentioned was the owner of the steamship CHRISTOPHER GALE, which steamship is within this district at the time this libel is filed.

THIRD: Respondent Luckenbach Steamship Co., Inc. was at all the times herein mentioned the charterer and/or agent of the steamship CHRISTOPHER GALE and has an office and place of business for vessel operations at the foot of 31st Street, Borough of

Brooklyn, County of Kings State of New York and within this district.

5 FOURTH: The aforesaid steamship CHRISTOPHER GALE was operated by its owner the United States of America or through the charterer and/or agent Luckenbach Steamship Co., Inc. either as a merchant or a public vessel; and for lack of sufficient knowledge or information as to whether the said SS. CHRISTOPHER GALE is and was a merchant or public vessel, libelant alleges in the alternative that it was and is either, and demands that respondent United States of America specifically and separately answer each of the following two subdivisions hereof: (a) the SS. CHRISTOPHER GALE was and is a merchant vessel; or (b) the SS. CHRISTOPHER GALE was and is a public vessel. Libelant brings this suit against the United States of America under and pursuant to the Act of Congress of March 9, 1920 known as the "Suits in Admiralty Act," if the SS. CHRISTOPHER GALE was employed as a merchant vessel; and under and pursuant to the Act of Congress of March 3, 1925 known as the "Public Vessels Act," if the said SS. CHRISTOPHER GALE was operated as a public vessel.

FIFTH: Libelant elects to proceed herein against the United States of America in accordance with the principles of libels in rem and also seeks relief in personam. All conditions precedent to suit under either and both of the aforesaid acts of Congress have been or will be performed and complied with by the libelant.

SIXTH: On the morning of April 6, 1946 the tug DAUNTLESS #6 reported at Fletcher's Yard, Hoboken, New Jersey to assist the SS. CHRISTOPHER GALE to move to 52nd Street, Brooklyn. The CHRISTOPHER GALE was light but using her own motive power and

6 at the time the GALE left Fletchers a pilot was on the bridge of the ship in charge of her movements and directed the placing of the DAUNTLESS #6 and gave direct orders to the #6 for all of her movements. Under the directions of the pilot the DAUNTLESS #6 took up a position on the port bow of the CHRISTOPHER GALE, with a headline and a springline out to the ship leading from the bow bitts of the tug.

The flotilla proceeded without incident down the North River to the southward of Governor's Island into Bay Ridge Channel, using the ship's engines and steering gear. The wind was from the west, gradually increasing in force, and the tide was the first of the flood. As the CHRISTOPHER GALE reached a point off the slip between 52nd Street Pier and Pier 1, which is immediately to the north, the docking pilot started to swing the ship into the slip between these two piers, apparently intending to allow the port side of the CHRISTOPHER GALE about midships to rest against the southwest corner of Pier 1, and then swing the ship around on the corner of Pier 1 so as to enter her into the slip.

As the ship turned in between the piers the helm of the GALE was hard left, the engines of the ship were going slow ahead and in accordance with orders given by the docking pilot the engines of the DAUNTLESS #6 were going full speed ahead. When the ship reached a position where the port side of the DAUNTLESSS #6 was about 100 feet off the southwest corner of Pier 1 and apparently because the wind was sagging the ship over to Pier 1, the docking pilot rang for full speed astern on the ship and ordered the DAUNTLESS #6 to go ahead with an extra jingle for additional speed. As the
7 astern movement of the ship's engines did not stop the sagging of the ship toward Pier 1, the docking pilot ordered the starboard anchor let go but the ship continued to sag lown toward the corner of Pier 1.

The master of the #6 saw that there was danger that his tug would be caught between the ship and the pier, so although he received no orders from the docking pilot he ordered his lines slacked off but despite this precaution the ship sagged down so quickly that the #6 was pinned in between the ship and Pier 1, resulting in the #6 being badly squeezed and seriously damaged.

The entire docking movement was directed by the docking pilot who gave the orders to the ship's helm and engine room, the telegraph to the engine room being handled by the master of the GALE but under the pilot's directions. All movements of the DAUNTLESS #6 were made on orders from the docking pilot until the master of the #6 believed that collision between his tug and Pier 1 was imminent, when he attempted to get away from the GALE and prevent his tug from being squeezed between the ship and pier.

SEVENTH: The aforesaid collision was not caused or contributed to by any fault or negligence of the libelant or of the tug DAUNTLESS #6, but was due solely to the fault and negligence of the respondent United States of America and/or the respondent Luckenbach Steamship Co., Inc. and the SS. CHRISTOPHER GALE and those in charge of her in the following, among other particulars which will be pointed out at the trial of this action:

1. In that those in charge of and navigating the SS. CHRISTOPHER GALE were careless, negligent, inattentive and incompetent.
8 2. In that those in charge of the SS. CHRISTOPHER GALE failed to make any or any proper allowance for the prevailing conditions of wind and tide.

3. In that those in charge of the SS. CHRISTOPHER GALE failed to stop timely and reverse its engines in order to prevent contact between Pier 1 and the DAUNTLESS #6.

4. In that those in charge of the SS. CHRISTOPHER GALE failed to cast anchor timely so as to check the sag of the GALE toward Pier 1.

5. In that those in charge of the movements of the CHRISTOPHER GALE failed to give timely warning of danger to the DAUNTLESS #6

and failed to give proper orders to the #6 to enable her to escape danger.

6. In that those in charge of the CHRISTOPHER GALE allowed the CHRISTOPHER GALE to sag down and crush the DAUNTLESS #6 between the ship and Pier 1.

7. In that those in charge of the CHRISTOPHER GALE failed to take any or any proper measures to prevent collision.

EIGHTH: By reason of the matters aforesaid libelant has been damaged in the cost of necessary repairs, towage, survey fees and other expenses in the sum of about $26,000 no part of which has been paid although duly demanded.

NINTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

9 WHEREFORE libelant prays that upon service of a copy of this libel on the United States Attorney for this district and the mailing by registered mail of a copy thereof to the Attorney General of the United States, the respondent United States of America may be required to appear and answer the matters aforesaid according to the principles of law and rules of practice obtaining in like cases between private parties and that this Honorable Court may adjudge and decree that that the respondent United States of America pay to the libelant its damages as aforesaid with interest and costs; and that the respondent Luckenbach Steamship Co., Inc. may be cited to appear and answer all and singular the matters aforesaid; and that this Honorable Court may adjudge and decree that the respondent Luckenbach Steamship Co., Inc. pay to the libelant its damages as aforesaid with interest and costs, and that libelant shall have such other and further relief as may be just in the premises.

PYNE and LYNCH,
Proctors for Libelant,
116 John Street
New York 7, N. Y.

10 IN UNITED STATES DISTRICT COURT

ANSWER OF THE UNITED STATES OF AMERICA AND LUCKENBACH STEAMSHIP CO. INC.—Filed July 13, 1948

The Answer of the United States of America and Luckenbach Steamship Co. Inc. as agent of the SS CHRISTOPHER GALE, respectfully alleges upon information and belief as follows:

FIRST: Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article First.

SECOND: Admits that the United States of America was the owner of the SS CHRISTOPHER GALE at all times mentioned in the libel but except as so admitted, denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Article Second.

THIRD: Admits the allegations contained in Article Third.

FOURTH: Admits that the SS CHRISTOPHER GALE was a merchant vessel.

FIFTH: The allegations contained in Article Fifth did not require an answer.

11 SIXTH: Except as hereinafter specifically admitted, denies the allegations contained in Article Sixth.

SEVENTH: Denies the allegations contained in Article Seventh.

EIGHTH: Denies the allegations contained in Article Eighth except that it admits that no payment has been made.

NINTH: Admits the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court, but except as so admitted, denies the remaining allegations in Article Ninth.

Further Answering Respondents Allege upon Information and Belief as Follows:

TENTH: On the morning of April 6, 1946, the SS CHRISTOPHER GALE was shifted from Fletcher's Yard, Hoboken, N. J. to the vicinity of the 52nd Street, Brooklyn pier, where she was to be docked on the north side of the pier. The steamer was light, was making use of her own propelling power and was being assisted by the tugs DAUNTLESS #6 and #9. The pilot in charge of the shifting operation from the bridge of the CHRISTOPHER GALE was in the employ of the Dauntless Towing Co.

When the CHRISTOPHER GALE reached the point off Pier #1, Bush Terminal, the Tug DAUNTLESS #6 was on the vessel's port bow with a head line and a spring line out to the ship leading from the bow bitts on the tug. The DAUNTLESS #9 was on the port quarter with a line to the ship.

12 When the GALE was in position to enter the slip her wheel was put over hard left to bring her bow in. The tugs were fully apprised of the maneuver to be performed and were working their engines ahead to hold the vessel up into the tide and wind. As the bow of the vessel started into the slip, although the DAUNTLESS #9 was able to hold the stern up, the DAUNTLESS #6 was unable to hold up the bow of the GALE and it sagged down toward the south side of Pier 1. The vessel's starboard anchor was dropped and the DAUNTLESS #6 slipped the lines from her bitts and started to back away. The CHRISTOPHER GALE continued to sag down and the DAUNTLESS #6 became wedged in between the vessel and the south side of pier #1.

ELEVENTH: Said contact and consequent damage, if any, sustained by the Tug DAUNTLESS #6 were not caused or contributed to by any fault or neglect on the part of the respondents, the SS CHRISTOPHER GALE or those in charge of her, but resulted from the ordinary risks of the operation for which the Tug DAUNTLESS #6 was engaged; or were due to the fault and negligence of the Tug DAUNTLESS #6 and those in charge of her in the following respects among others which will be proved at the trial:

1—She was not in charge of competent persons.

2—She failed to carry out the orders received from the docking pilot.

3—She failed to check the movement of the bow of the GALE and prevent it from closing in toward the pier.

13 4—She failed to make any or any proper allowance for the prevailing conditions of wind and tide.

5—She failed to maneuver her rudder and engines properly so as to effectively hold the Gale up to the wind.

6—She failed to maintain her engines in efficient operating condition.

7—She was unseaworthy and unable to do the work for which she was reasonably relied upon

8—She failed to timely recognize the danger of her position and maneuver clear of the vessel's side.

9—She failed to take any or any proper and timely precautions to avoid collision.

WHEREFORE, respondents pray that the libel herein be dismissed as to them with costs.

J. VINCENT KEOGH,
United States Attorney,
Proctor for Respondent,
Office and Post Office Address:
45 Broadway,
New York 6, N. Y.

14 In United States District Court

INTERROGATORIES ADDRESSED TO THE RESPONDENTS UNITED STATES OF AMERICA AND LUCKENBACH STEAMSHIP CO., INC.—Filed February 7, 1953.

FIRST: At the time the CHRISTOPHER GALE was entering the slip to the North [illegible] 52nd Street, Brooklyn, on the morning of April 6, 1946, state the overall length, beam, and depth of the S/S CHRISTOPHER GALE and what was her draft forward, aft, and midships at the time she entered the slip.

SECOND: (a) Was there a pilot on board the S/S CHRISTOPHER

GALE on the morning of April 6, 1946 at the time she entered the slip to the North of 52nd Street, Brooklyn and if so (b) did the pilot give orders to the tugs DAUNTLESS #6 and DAUNTLESS #9 which were assisting the S/S CHRISTOPHER GALE, (c) did the pilot give orders for the use of the engines and the helm or rudder of the S/S CHRISTOPHER GALE, (d) by whom was the pilot furnished or supplied, (e) did the owner or operator of any tug furnish or supply or arrange for the pilot and if so what owner or operator, and (f) was there an agreement between the owner or operator of the CHRISTOPHER GALE and the owners or operators of the tugs or the person or company who supplied the pilot, which in effect or substance provided that the pilot was or would be the
15 agent or servant of the CHRISTOPHER GALE or her owner or operator, and if there was such agreement what in full and verbatim were its conditions.

Dated February 3, 1953.

Yours etc.,

PYNE, LYNCH & SMITH,
Proctors for Libellant,
116 John Street,
New York 38, N. Y.

To:

MYLES J. LANE, ESQ.,
United States Attorney,
Proctor for Respondent,
United States Court House,
Foley Square,
New York, N. Y.

16 IN UNITED STATES DISTRICT COURT

ANSWERS OF THE RESPONDENT, UNITED STATES OF AMERICA, TO THE INTERROGATORIES OF THE LIBELANT—Filed February 20, 1953

FIRST: The dimensions of the SS CHRISTOPHER GALE on April 6, 1946 were as follows:

Overall length	422.8 feet
Beam	57 feet
Depth	34.8 feet
Draft-f'wd.	7 feet 5 inches
Aft	13 feet 5 inches
Midships	No record
Mean	10 feet 5 inches

SECOND: (a) There was a so-called "shifting pilot" on board the SS CHRISTOPHER GALE on the morning of April 6, 1946 at the time she entered the slip to the north of 52nd Street, Brooklyn.

(b) The "shifting pilot" gave orders to the Tugs DAUNTLESS #6 and DAUNTLESS #9 which were assisting the SS CHRISTOPHER GALE.

(c) The "shifting pilot" requested helm and engine movements from the helmsman and engineroom personnel of the SS CHRISTOPHER GALE and his requests were carried out pursuant to previous
17 instructions and arrangements made by the master of the CHRISTOPHER GALE.

(d) The "shifting pilot" was an employee of Chris Neilson, et al, trading under the firm name of Dauntless Towing Line and was furnished by him.

(e) See answer to Second (d) above.

(f) A schedule of rates containing the following provision was sent to Luckenbach Steamship Co., general agents for the United States of America herein, prior to the time the "shifting pilot" was on board the vessel:

> "Pilotage—When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power, goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owner (s) of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel (s), and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom."

The respondent, United States of America, denies that this schedule constitutes any agreement between libelant and respondent, United States of America, and denies that any such agreement, if made, would be valid and enforceable, on the contrary, alleges that it would be against public policy and void; and further alleges that said "shifting pilot", did not in fact become the agent or
18 servant of respondent, United States of America.

FRANK J. PARKER,
United States Attorney,
Proctor for Respondent,
U. S. Courthouse,
Foley Square,
New York 7, N. Y.

Dated: New York, N. Y.

February 1953.

19 In the United States District Court

TRANSCRIPT OF HEARING—APRIL 15, 1953

Brooklyn, New York.

Before:

HONORABLE CLARENCE G. GALSTON,

U. S. D. J.

APPEARANCES:

MESSRS. PYNE, LYNCH & SMITH,
Proctors for the Libelants,
By ANTHONY V. LYNCH, ESQ., Advocate.
FRANK J. PARKER, ESQ.,
United States Attorney for the
Eastern District of New York,
By GILBERT S. FLEISCHER, Esq., Advocate.

COLLOQUY

Mr. LYNCH: If your Honor please, this is an action by Dauntless Towing Line as owner of the DAUNTLESS #6 for damage sustained by that tug on April 6, 1946 while assisting in the docking of the Government vessel CHRISTOPHER GALE.

20 At the time there was a docking pilot on the ship in charge of the maneuvers of the ship's engines which were being used, and he was giving orders to the two assisting tugs, the Dauntless #6 which was on the port bow and the DAUNTLESS #9 which was on the port quarter. The GALE had been undocked at Fletcher's Yard in Hoboken, and proceeded down the river to the southward of Governors Island, and then down the channel to a point off 52nd Street and Pier 1, Bush docks. Apparently it was planned by the pilot to swing the ship around, and go head first into the slip between 52nd Street and Pier 1. In making that maneuver the wind increased in gusts until such time as it began to have an effect on the CHRISTOPHER GALE. And although both tugs, the #9 on the port quarter and the #6 on the port bow went full ahead in order to try and keep the ship off from sagging down on the corner of Pier 1, nevertheless the ship did sag down and it was impossible for the Tug #6 to get out from between the ship and the dock, with the result that she was crushed against the end of the dock.

We expect to prove that during this maneuver the orders given by the docking pilot were to the effect that the two tugs were to keep pushing ahead in order to try and hold the ship off the dock. At no time was there any order given to the DAUNTLESS #6 to attempt to pull out from between the ship and the dock, and it wasn't until the Captain of the #6 felt that a collision with the dock was imminent that he then slacked off his line and tried to get out

from between the ship and the dock, but without success, and he was crushed.

It is admitted in the answers to the interrogatories to the Government that at the time this accident happened there was in
21 effect the usual pilotage clause by which the pilot becomes the servant of the ship. We therefore say that despite the fact that Robert Neilson was a son of one of the partners in the Dauntless Towing Line, nevertheless we are entitled to the provisions of the towage and pilotage contract by which the Government would be responsible for any damage that was sustained by the tug.

The COURT: Is there a cross libel?

Mr. LYNCH: No, your Honor, there was no damage to the Government ship.

Mr. FLEISCHER: If it please the Court, the Government defends this suit for itself and for Luckenbach, which was acting as agent under a general agency agreement for the Steamship CHRISTOPHER GALE.

It is our contention, continuing from where Mr. Lynch left off, without having to repeat many of the facts which he mentioned, which are undisputed, that there was a pilot on the ship, and that she was assisted by two tugs, the DAUNTLESS #6 and the DAUNTLESS #9 which are owned and operated by the Dauntless Towing Line, and that the pilot was furnished by Dauntless Towing Line.

The ship was coming down the Bay Ridge Channel, and approaching the 52nd Street Pier. Your Honor may recall that the 52nd Street Pier in Brooklyn is a rather long pier, and at the outer end—

The COURT: You say this is a long pier extending out into the river?

Mr. FLEISCHER: Extending into the Bay Ridge Channel. I have a chart which I will hand to your Honor so that you can follow the testimony.

This outer end has an overhang which is used by the Department of Sanitation. It is a rather ingenious setup that they have
22 there. They have these refuse trucks come in there and go up this platform, and back up where the overhang is on the north side of the pier, and dump their contents into a barge which lies below. These barges go out of there usually having the contents of, it looked to me like about 1000 trucks when I was over to look at them.

The COURT: What is the nature of this overhang?

Mr. FLEISCHER: I believe it is a steel structure, with steel beams which protrude out over the water I would say roughly about 25 feet.

The COURT: From the outshore end of the dock?

Mr. FLEISCHER: From the end, from the north end of the 52nd Street Dock.

The COURT: But from the deck floor of that dock?

Mr. FLEISCHER: No, I think from the second deck. In other words it would be higher up; it wouldn't be from the deck floor, it is higher up, and it protrudes out and runs back for a distance of several feet from the pier end, that is the outshore end.

This (indicating) is the 52nd Street Pier, and the intention was to berth the vessel behind that, in the inner berth of the 52nd Street Pier. Adjoining across the slip is Pier 1 Bush Terminal. This is a pier of the same length as the 52nd Street Pier. That is a covered pier.

The COURT: Have you a map so that I can see this?

Mr. FLEISCHER: Yes, I have this map, and I also obtained from the Army Engineers a drawing showing a larger area of these piers. May I approach you?

The COURT: Yes.

Mr. FLEISCHER: The intended berth was in here (indicating). You see they were going to put the ship back here; it only takes up about half. You see this is a very long berth for piers.

23 I have the dimensions of the vessel, the ship was only about 420 feet long, so she would only take up about this much.

The COURT: What is the length of this pier here, about 1000 feet?

Mr. FLEISHER: About 1200 I think.

Mr. LYNCH: Do you want to tell his Honor that the width of this slip is approximately 230 feet?

The COURT: It looks like a wide slip there.

Mr. FLEISCHER: It is quite a wide slip.

They apparently proceeded down through the Red Hook Channel, then the Bay Ridge Channel, and were in behind 52nd Street right here, and they were coming in this direction.

The COURT: They were proceeding southerly?

Mr. FLEISCHER: Proceeding southerly.

Mr. LYNCH: They came down the North River and to the southward of Governor's Island, down Red Hook Channel, and Bay Ridge Channel to destination.

The COURT: This is the Narrows out here?

Mr. LYNCH: Yes, that is right.

Mr. FLEISCHER: And the wind I think was blowing from the southwesterly direction.

Mr. LYNCH: And the tide was flood.

Mr. FLEISCHER: About the middle of the flood at the time of the accident.

Mr. LYNCH: Yes.

Mr. FLEISCHER: About a knot current or thereabouts?

Mr. LYNCH: I don't know just what that was.

Mr. FLEISCHER: I offer in evidence a United States Coast and Geodetic Chart No. 541.

24 The COURT: Mark it.

(Marked Respondents' Exhibit A of this date.)

Mr. FLEISCHER: I offer in evidence a chart prepared by the corps of engineers, United States Army, port facilities in the Port of New York, Bay Ridge Channel.

The COURT: Mark it.

(Marked Respondents' Exhibit B in evidence.)

Mr. FLEISCHER: I think the testimony will show your Honor in approaching the berth the pilot had arranged with the tugboats that he would warp the vessel into the slip resting her, at one time resting her amidship against the south corner of Pier 1 Bush, and then bringing her in and placing her with the two tugs on the opposite side of the slip at the 52nd Street Pier inner berth. And I think possibly one of the considerations for bringing her close to Pier 1, and also warping her around,—oh, there might have been several considerations, but one in particular would be the fact that this overhang was on the 52nd Street Pier right opposite, and the pilot wanted to make sure that he would not get tangled up in this overhang. Another possible reason, as may come out in the testimony, is the fact that we have a very old and weak tug, the Dauntless #6, on the port bow of the ship. The Merchant Vessel Register shows the horsepower of that tug was 387, and I think possibly that that was another consideration, if not the main consideration which the pilot had in mind in bringing it to rest on the south corner of Pier 1 so that he could then very easily and tenderly bring her in without placing too much burden on the port bow tug.

25 The COURT: Did there come a time before the accident when the Christopher Gale was heading into the slip?

Mr. FLEISCHER: Yes.

The COURT: With the bow forward?

Mr. FLEISCHER: Well, not heading straight into the slip, but on an angle, sort of beginning to enter the slip, making the turn on a left wheel. And as a matter of fact everything was going along fine as she started to make her turn, everything was fine, but as the pilot wanted to bring her to rest on the corner of Pier 1, the tug was unable to hold her up, and the wind was blowing from the southwest against the side of the ship, which was light and out of the water, caused her to sag down and the tug couldn't hold her up against the wind.

The COURT: Where is Pier 1?

Mr. FLEISCHER: This is 52nd Street, and this is Pier 1.

The first time that the trouble developed was when the ship had turned and exposed her starboard side to the southwest wind. And she was high out of the water, she was light, she is a Liberty ship, a good target for the wind, and the wind took her, and the tug was chugging on the other side, they just couldn't hold her up, and gradually she comes down, even though the pilot ordered the anchor

let go, it was let go immediately but it didn't hold. At the last moment he tried to put her astern, hoping in going astern he might bring his bow out a little bit and she would have an opportunity to get out, having so recognized that the tug was unable to hold the ship up, and she was losing ground.

The COURT: Did she have the right to get out?

Mr. FLEISCHER: I think she did have the right to get out, because it seems to be quite well established that the tug master owes
26 a first duty to his own vessel and his crew, the safety of his crew. There are cases that hold that the tug is not obliged to stay on even if she doesn't get an order to go out. There may be some testimony to show there were orders given to her to go out, but she knew, whether she took a chance or not, she knew that she was standing in danger better than anybody else.

The COURT: The controversy crystalizes to this, that the libelant claims that no orders were given to protect the tug, and on the other hand you say that the tugboat captain should have apprehended the danger and pulled away.

Mr. FLEISCHER: I would go back further than that, your Honor, and say that crystalizing the issue the towboat's power used was inadequate, and that was the thing that was the proximate cause of all this trouble, the inadequacy of the tugboat's power.

The COURT: Who selected that tug?

Mr. FLEISCHER: There will be testimony showing that the Dauntless Towing Line was engaged as an independent contractor to shift the vessel from Hoboken to Brooklyn.

The COURT: Then the choice of the tugs was that of the libelant?

Mr. FLEISCHER: Exactly, sir.

The COURT: All right.

Mr. FLEISCHER: I think Mr. Lynch pointed out in answers to interrogatories that we should take notice of the schedule of rates containing the pilotage clause, and we contend that will be an issue in the case, and not only should the pilotage clause be in but the whole contract of towage should be in, because the pilotage clause is only one part of it.

For that reason, your Honor, I would like permission at this time to amend the Government's answer and Luckenbach's answer
27 to include certain statements which would bring into issue the contract as well as the pilotage clause.

Mr. LYNCH: We have no objection to all of it being in, your Honor.

The COURT: All right.

Mr. LYNCH: That is the rate schedule as furnished by Dauntless to Luckenbach as agent for the Government.

Mr. FLEISCHER: No, that is not what I had in mind at the moment. You may put that in as part of the arrangement.

Mr. LYNCH: That is what I would consent having go in; I do not know any other contract that exists.

Mr. FLEISCHER: That would be the general contract, that is a long standing arrangement, but we want to get into the specific contract or agreement which took place at this time.

The amendment I would ask to add to the answering clause.

In the further answering clause, Article 10 I would like to insert ahead of the paragraph, as a first paragraph I should say "That on or about April 6, 1946 the respondent, through its agent engaged the Dauntless Towing Line to shift the Steamship Christopher Gale from Hoboken to Brooklyn, the steamer to use her own propelling power. Pursuant to this contract of towage the Dauntless Towing Line furnished a shifting pilot and the tugs Dauntless #6 and Dauntless #9 to perform the shifting operation."

That is the one amendment I offer.

Mr. LYNCH: I have no objection to that, your Honor.

The COURT: All right, it is allowed.

Mr. FLEISCHER: I would also like to add by way of amendment two separate and distinct defenses.

The COURT: That is to your answer?

28 Mr. FLEISCHER: That is right. I might say as an introductory remark, your Honor, that not until the interrogatories were propounded was there any mention in the libel of the pilotage clause or of the contract of towage.

The COURT: All right.

Mr. FLEISCHER: And that is why since that has been brought into the case I think we should have these amendments.

The following to be added as a separate and distinct defense:

The COURT: This is paragraph 12?

Mr. FLEISCHER: That would be Article Twelfth, your Honor is right.

"Pursuant to the contract of towage referred to herein above the Dauntless Towing Line were engaged as an independent contractor to perform the shifting operation described above and are solely responsible for any fault, neglect or want of care on the part of their agents, servants or employees causing damage to the Dauntless #6 as alleged in the libel and neither the United States of America, Luckenbach Steamship Company or their agents, servants or employees are liable therefor."

And as a separate and distinct defense respondents allege as follows:

"That the pilotage clause made a part of the Schedule of Rates of the Dauntless Towing Line does not constitute any agreement between libelant and respondents and denies that any agreement, if made, would be valid and enforceable, on the contrary, alleges it

would be against public policy and void; and further alleges it does not apply to the cause alleged in the libel." Those are matters of defense.

29 The COURT: Any objection?

Mr. LYNCH: Well, I do of course object to it, your Honor, as not being in accordance with the facts.

The COURT: I do not mean as to the merits, I mean as to the amendment of the pleadings.

Mr. LYNCH: Oh, no, none whatever.

The COURT: Then the amendments to the answer will be allowed.

Mr. FLEISCHER: Thank you, sir.

The COURT: Mr. Fleischer, I suppose you agree with what Mr. Lynch told me, that although the pilot on the Christopher Gale was the son of one of the partners of the libelant, that would not free the respondents from liability?

Mr. FLEISCHER: Well, your Honor, my answer to that would be in this way, that we propose to attack the pilotage clause in this case as being invalid and unenforceable, as being void.

The COURT: Let me see the contract; I would like to see that pilotage clause.

Mr. FLEISCHER: We say further in fact the pilot was not the servant of the vessel owner, and we propose to show that——

Mr. LYNCH: The last paragraph of this is the pilotage agreement.

The COURT: This is the contract you entered into, isn't it?

Mr. FLEISCHER: That is right, but we do not agree that the pilotage clause is an enforceable clause. We say it is void as being against public policy.

The COURT: Did you raise that at the time you signed the contract?

Mr. FLEISCHER: No. There are two other points in connection with the pilotage clause——

30 Mr. LYNCH: I would like at this time to offer this pilotage agreement in evidence.

The COURT: Yes, mark that as an exhibit..

(Marked Libelants' Exhibit 1 in evidence.)

Mr. FLEISCHER: I have no objection to this going in evidence, but I do say that it is our contention that the pilotage clause is not valid or enforceable.

Mr. LYNCH: I can't help your objecting.

Mr. FLEISCHER: We say further as an additional attack on the pilotage clause that it does not apply in a situation where the towage company seeks to recover against the vessel for damage to its own equipment. In other words if the pilotage clause would be considered valid, we would say that it could be used as a shield for liability against third parties, but not as a sword to involve liability for its own equipment.

The COURT: I understand the distinction.

Mr. LYNCH: If your Honor please, I intend to cite to your Honor several cases in this district which are on that very point, and one of them is your Honor's own.

Mr. FLEISCHER: I think we have outlined the facts to your Honor, and the only thing we can accomplish now, since we had no pre-trial, would be to perhaps mark some additional exhibits, if Mr. Lynch wants to do that, or stipulate as to certain facts, as to the size of the vessels, the dimensions and so forth.

Mr. LYNCH: If your Honor, please, I would like at this time to offer in evidence as Libelants' Exhibit 2 a letter from Dauntless to the operating manager of Luckenbach Steamship Company who are the agents for the Government in the operation of the Gale, in which receipt of this schedule which has been marked
31 Libelants' Exhibit 1 is acknowledged.

Mr. FLEISCHER: There is no objection, we have admitted that in the answer to the interrogatories.

(Marked Libellants' Exhibit 2 in evidence.)

Mr. LYNCH: I think one of the important things about this letter is, you will note that it is dated in 1942, so that it shows that over a period of years the Government has been advised and was aware of the pilotage clause, and that it was binding upon them in any pilotage that was furnished by Dauntless Towing Line.

I would also like to offer as Libelants' Exhibit 3 the daily local weather record for Saturday, April 6, 1946.

(Marked Libelants' Exhibit 3 in evidence.)

(Statements made off the record.)

Mr. FLEISCHER: We can read into the record the dimensions of the Christopher Gale and the tugs.

The COURT: All right.

Mr. FLEISCHER: The Christopher Gale, and these are as listed in the Merchant Vessel book of the United States which is printed by the United States Treasury Department, Bureau of Customs, and the date on this one is 1945. I tried to get one for 1946, but I couldn't find it.

The Christopher Gale: Gross tonnage 7177; net tonnage 4375; length 422.8; breadth 57; depth 34.8; built 1943 at Wilmington, North Carolina; service, freight service; crew 54; horsepower 2500; owner U. S. War Shipping Administration; home port, Wilmington, North Carolina; official number 243025; signal and radio call
32 letters KKXP; rate steam screw.

The Dauntless #6: Gross tonnage 148; net tonnage 100; length 113.5; breadth 21.2; depth 9.3; when built 1884; where built Philadelphia, Pennsylvania; service, tow; crew 10; horsepower 387;

name of owner Dauntless Towing Line; home port New York, N. Y.; official number 215571; signal and radio call letters KJHO; rate steam screw.

There is other information as to the tug in this same book which I would like to put in evidence, the former name of the tug, may I?

Mr. LYNCH: Surely.

Mr. FLEISCHER: The former name of the tug was the Governor P. F. Thomas, when she was a Maryland police boat, and a latter name was the Mary W. Potter, when she was with the Potter Transportation.

Then the other tug is the Dauntless #9: Gross tonnage 131; net tonnage 89. The Dauntless #9 was on the stern of the vessel. The length is 85.3; breadth 21; depth 12; when built 1905; where built Cleveland, Ohio; service tow; crew 5; horsepower 900; owned by Dauntless Towing Line; home port New York, N. Y.; official number 202072; has no radio signal; steam screw.

The COURT: Were the tugs lashed alongside, or was there a line out?

Mr. LYNCH: The #6 had a bow line and a spring line, and I presume that the #9 had the same.

Mr. FLEISCHER: The bow line and the spring line went to the bow bitt of the tug——

Mr. LYNCH: Of the ship.

Mr. FLEISCHER: (Continuing)—to the ship, and back to the bow bitt of the tug. In other words they weren't on two different parts of the tug.

33 Mr. LYNCH: No.

The COURT: We will take a short recess.

(Short recess.)

EINER BERGSTED, called as a witness on behalf of the libelant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. LYNCH:

Q. Captain, what license do you hold?

A. Coastwise Master and pilotage.

Q. For any tonnage?

A. Any tonnage on the pilot's license, yes.

Q. In 1946 what license did you hold?

A. Coastwise and pilotage any tonnage.

Q. During your experience what type of work have you engaged in?

A. In general towing, docking ships, towing barges and so forth and so on.

Q. At the present time are you towing mostly in southern waters and to Cuba and other places down there?

A. Yes, right now, yes.

Q. On April 6, 1946 were you the Master of the Dauntless #6?

A. That is right.

Q. Do you remember on that day assisting in undocking and docking the Christopher Gale?

A. Yes.

Q. Where did you pick up the Christopher Gale?

A. In the Fletcher Dry Dock, Hoboken, New Jersey.

Q. Where was she taken?

A. 52nd Street, Brooklyn.

Q. At the time you left from Fletcher's Dry Dock was there any other tug besides the #6 assisting?

A. Dauntless #9.

34 Q. As you were made up what was your position on the Christopher Gale and what was the position of the #9?

A. When we docked at 52nd Street I was made up on the port bow of the ship, and the #9 was on the stern, port quarter.

Q. And who was in charge of the maneuvers, was there a pilot on board?

A. Pilot Robert Nielson.

Q. Who was giving the orders to the tugs?

A. The pilot on the ship.

Q. Do you know whether the engines of the ship were being used?

A. Yes, they were being used.

Q. What was the condition of the ship, was she light or loaded?

A. She was light.

Q. As you proceeded from Fletcher's Dry Dock down the bay what were the weather conditions?

A. It was fresh to strong west and southwesterly wind.

Q. How was the tide?

A. Flood.

Q. Cloudy or fair or what?

A. Cloudy.

Q. In what waters did you proceed to reach a point off 52nd Street?

A. We went down the Hudson River, around Governor's Island, in through the Buttermilk Channel and down the Bay Ridge Channel, following the Brooklyn shore.

Q. When you got off 52nd Street what orders if any did you receive from the docking pilot?

A. Make up upon the port bow.

Q. As you made up on the port bow, will you tell the Court please what lines were put out?

A. I put a spring line from my bitt up on the ship.

Q. That is from your bow bitt?

A. Yes, leading aft, and a backing line from our bow bitt up on the bow of the ship

35 Q. As you were made up in that fashion, how far would you say the stem of your tug was aft from the stem of the CHRISTOPHER GALE?

A. About 75 feet.

Q. All right. After you had made fast what orders did you receive from the docking pilot?

A. He gave me orders to come ahead, full speed ahead.

Q. Did you obey those orders?

A. Yes, sir.

Q. After that just tell us what happened, were there any other orders that you received, and tell us what occurred.

A. Well, when we started in the slip she started to sag down toward the dock——

Q. That is on Pier 1?

A. Yes.

Q. Sag down on Pier 1?

A. Yes, and he gave me an order to give another jingle, which means give her all we have got, and I gave her all we got.

The COURT: I do not understand that, will you repeat it?

(Last question and answer repeated.)

The COURT: Who started to sag down?

The WITNESS: The ship, sir, the ship was sagging down.

Q. Go ahead, what happened after that?

A. I tried to hold the ship up against the wind and flood tide, but she was setting down, the ship was coming down on Pier 1, and when we got too close, and she was setting down, I slacked my line in order to try to get away from there, get out of there, but I couldn't do it because the ship came down too fast and jammed me between the corner of the pier and the ship.

36 Q. Did it damage your tug considerably?

A. Yes, I got hit behind the boiler in the engine room.

Q. At any time after the ship started to sag down towards Pier 1 did you receive any other orders from the docking pilot than to give her a jingle?

A. No.

Q. No other orders were issued to you whatsoever?

A. No other orders were given.

Q. I believe that the length of the #6 is 110 feet, is that right?

A. She was about 113 feet.

Q. 113 feet, and have you ever been on other tugs as long as that which were used in docking and undocking, other Dauntless tugs, let us limit it to that.

A. Yes, I have been deck hand on other boats, on the DAUNTLESS #8.

Q. What boat are you on now?

A. I am on the DAUNTLESS #15.

Q. Have you done any docking or undocking with her?

A. We docked two ships yesterday.

Q. What is her length?

A. She is about 113 feet.

The COURT: What was the direction of the wind did you say?

The WITNESS: West to southwesterly.

The COURT: Was it a strong wind?

The WITNESS: A strong wind, yes.

Mr. LYNCH: Your witness.

CROSS EXAMINATION.

By Mr. FLEISCHER:

Q. Captain, how long were you on the DAUNTLESS #6?

A. I had been on her since 1936—that is since 1930 until 1936, and I was off for about five months, and I come back again in 1936, and I got off in 1937, and I come back again in 1941, and from then on until she was done.

37 Q. What work did the DAUNTLESS, what work was the DAUNTLESS #6 used for?

A. She was used for general towing in the harbor, docking ships, towing barges, towing coastwise.

Q. For towing coastwise?

A. Towing and docking and undocking ships.

Q. Could you tell us what she was used most for?

A. Well, she was used quite a lot on harbor work.

Q. Barges?

A. Yes, and ships.

Q. Would you say she was used to tow barges more than she was used for ships?

A. Well, probably, yes.

Q. And you were aboard her during those times?

A. That is right.

Q. Where did you tow these barges?

A. We towed them from New York to Boston, to Maine, to Philadelphia and Norfolk, and around New York Harbor.

Q. Are you still employed by the Dauntless Towing Line?

A. Yes, sir.

Q. And you are now aboard the DAUNTLESS #15 did you say?

A. That is right.

Q. Where is the DAUNTLESS #15 used mostly, Captain?

A. She is used around the harbor and coastwise and foreign.

Q. What do you mean by coastwise, what do you do coastwise, tow barges?

A. Tow barges and ships.

Q. You have been out of New York Harbor for some time now?

A. Well, I have been away now for about three and a half months, I would say.

Q. Were you on the DAUNTLESS #15?

A. That is right.

Q. What work is she doing down there?

A. We were towing a ship that had been made into a barge, about 7,000 tons.

38 Q. And carrying cargo on it?

A. That is right.

Q. And the DAUNTLESS #15 you say is 113 feet long?

A. About that, yes, sir.

Q. Do you plan to leave the harbor again soon?

A. Well probably, yes.

Q. On the #15?

A. Oh, yes.

Q. What type of work will she do, towing barges?

A. Towing the same ship.

Q. Do you know when the DAUNTLESS #15 was built?

A. Yes, she was built in Oyster Bay in 1944 I think.

The COURT: I do not understand the relevance of these inquiries about the #15.

Mr. FLEISCHER: I think that most of the witness' experience is in towing barges; I just want to develop that if I can.

Mr. LYNCH: If your Honor please, a subpoena has been issued by Mr. Fleischer for the towing receipts of the #6 showing exactly how many ships she docked and undocked during the period he has asked for, three years. The reason that I asked about the #15 and her length and everything, Mr. Fleischer seemed to intimate in the deposition he took that he would criticize us for using the #6 because of her length, she being 113 feet long. That is why I brought out the length of the #15.

Mr. FLEISCHER: Which is exactly the point, as Mr. Lynch has stated, I do criticize the length of the #6 as a docking tug, and compared with the DAUNTLESS #15, she is used for the towing of barges.

The COURT: Go on.

Q. Since 1946, Captain, were you on board the DAUNTLESS #15?

A. That is right.

39 Q. What kind of work was the DAUNTLESS #15 doing since 1946?

A. Docking ships, and towing barges and ships.

Q. What does that consist of?

A. Probably most of that is on the outside, probably.

Q. Outside of the Harbor?

A. Probably, yes.

Q. Towing barges? Would you describe what kind of a tug she is, is she a Diesel tug?

A. A Diesel tug.

Q. What is her horsepower?

A. Over 1200.

Q. What is her width?

A. Her width?

Q. The beam.

A. 25 feet.

Q. Captain, I ask you to draw an outline of the Tug DAUNTLESS #6 and show the place of the bitt or bitts where the lines were attached on the tug, and show how they led?

A. (Witness draws on paper.)

Q. You drew the ship, and you drew the Tug DAUNTLESS #6 alongside. What I really meant, I probably did not make it very clear, I wanted a picture of the tug itself, just the tug.

The COURT: Why don't you leave that in?

Mr. FLEISCHER: Yes, we can leave that in. But right next to it could you draw an enlarged picture of the tug showing just where the lines led from the tug and where the bitt was located on the deck of the tug?

Mr. LYNCH: Do you want those marked with letters, which is the backing line and which is the spring line?

The COURT: Yes, you had better do that.

(Witness draws and marks.)

40 Q. Will you mark the backing line as A, and the spring line as S?

A. Yes (marking).

Q. And would you put alongside that "Tug" so we will know that that is the tug?

A. Yes (marking).

Mr. FLEISCHER: We will offer that in evidence, your Honor.

(Marked Respondents' Exhibit C in evidence.)

Q. Captain, on this drawing which you just made you show a dark dot at the very stem of the boat. Is that supposed to be a bitt also?

A. Well, that is a small bitt up on the stem.

Q. After that you have got another dark dot, and after another dark dot.

A. That is right, that is the main bitt.

Q. Those are the main bitts?
A. That is right.
Q. Is that called a cavel bitt, is there one bitt or more than one bitt?
A. One solid bitt.
Q. One solid bitt?
A. Yes.
Q. Has it got a pin through it?
A. No, we have got two poles sticking up.
Q. Could you call that a cavel bitt?
A. Yes, it overhangs here.
Q. Now, you have the backing line running to the forward part of that double bitt?
A. The backing line is on the after part.
Q. On the after part?
A. The after part, yes, sir.
Q. And the spring line goes where?
A. To the forward part of the bitt.
Q. So that each line is all separate?
A. Separate altogether.
41 Q. On a separate bitt?
A. Yes, that is right.
Q. How many men did you have in the crew on the DAUNTLESS #6?
A. Two deck hands, two firemen, two engineers, two in the wheelhouse and one cook.
Q. When you say two in the wheelhouse, do you mean someone else besides yourself?
A. The mate.
Q. Did you have a deck hand on duty that day, April 6, 1946?
A. Yes.
Q. Where was he?
A. He was on the bow watching the lines.
Q. Was he the one who made the lines fast?
A. That is right.
Q. When were these lines first made fast there, Captain?
A. They were made fast about a half an hour before we come into the pier, on the outside of 52nd Street.
Q. Was it before you got to Governors Island or after?
A. After we passed that.
Q. After you passed Governors Island?
A. Yes.
Q. And then you made fast up on the ship?
A. Yes.
Q. On the port bow of the ship?
A. Yes.

Q. In this fashion?
A. Yes.
Q. Did you ride along down with the ship downstream?
A. Only a short while.
Q. Until you got around 52nd Street?
A. That is right.
Q. When I say ride along with him, you coasted your engines and just let the ship pull you along, is that correct?
A. The engine was stopped on the tug.
Q. In other words the ship was pulling you along?
A. That is right.
Q. And that of course puts a strain on these lines, does it not?
A. Very little, because we are almost down there when I make up to the ship.
42 Q. About a half an hour before you say you made up?
A. Well, about 20 minutes.
Q. Didn't you say half an hour just awhile ago?
A. Well, 20 minutes to half an hour, yes.
Q. And this deck hand was standing up in the bow?
A. Yes.
Q. In charge of the lines?
A. He took care of the lines.
Q. How many turns were there around the bitt?
A. There was regular turns.
Q. How many would that be?
A. That would be two full round turns underneath, and four or five round turns around the bitt.
Q. I do not quite understand; you say two full turns underneath?
A. That is right.
Q. What does that mean?
A. That means that the spring line comes down and goes underneath the bitt, then around the bitt and underneath again, and it comes up again and then underneath, and then comes up and goes around four or five times.
Q. And then when it goes around four or five turns it is finished off?
A. Yes, sir.
Q. And it was the same with the backing line?
A. That is right.
Q. In the opposite direction?
A. That is right.
Q. What would you have to do to release those lines?
A. Unravel them?
Q. Unravel them.
A. Untie them?
Q. Unravel them from the bitts.

A. Start from the top and go down.
Q. Does she slip through on the bottom?
A. Yes.
Q. If there is a strain on the line?
A. You have got to take the turns off from the top in order to release them.

43 Q. In other words all you have to do is to take them off the top, and then if there is a strain on the line she just goes through and lets go, is that right?
A. Yes.
Q. And taking off two or three turns on top, that doesn't take long, does it?
A. Oh, yes.
Q. How long would it take?
A. You mean one line?
Q. Just one line, taking off the three or four turns.
A. A minute or more.
Q. It would take 60 seconds?
A. Yes.
Q. You mean just three or four turns?
A. They take five turns, probably a little more, and then you have to take three turns off on the bottom.
Q. If you were in a hurry you could do it faster than a minute?
A. Not much.
Q. Who was the deck hand on the bow of the DAUNTLESS #6 on April 6, 1946 when you were approaching the 52nd Street Pier?
A. His name was Olsen, Julius Olsen.
Q. Do you know where he is now?
A. No.
Q. Have you seen him lately?
A. No, I haven't seen him.
Q. When have you seen him last?
A. I think about 1949, something like that.
Q. Was that in New York?
A. Well, he was working for Dauntless.
Q. He was working for Dauntless in 1949?
A. Yes.
Q. But you haven't seen him since?
A. He is probably here, but on another boat.
Q. Do you know whether he is in New York harbor?
A. No, I don't know where he is.
Q. Does he still work for Dauntless?
A. No, he isn't working there any more.
Q. Where was the mate that day?
A. He was off watch.

44 Q. Where was he?

A. I don't know, he was sleeping probably.

Q. Where was the other deck hand?

A. He was down below.

Q. Did you have only one deck hand on watch?

A. Yes.

Q. And one was below?

A. Yes.

Q. What was his name?

A. I can't remember what his name was.

Q. You can't remember, what was the name of the mate?

A. The mate, I can't remember the mate's name. That was 1946. We had at one time Hugh Welder, I think he was there.

Q. You think he was the mate?

A. I believe so.

Q. Were you alone in the wheelhouse?

A. Yes, sir, right then I was, yes.

Q. Your tug was 113.5 registered length, is that correct, Captain?

A. That is right.

Q. And her beam was 21.2, is that correct?

A. Yes.

Q. She was long and narrow, is that correct?

A. Yes.

Q. And her horsepower as licensed was 387?

A. Around that figure, around 380 or 400.

Q. When you were approaching the 52nd Street Pier did the pilot give you any instructions or tell you about any of his plans with respect to docking the vessel?

A. No, no plans.

Q. No plans?

A. No.

Q. Did you have any idea what he was going to do?

A. I had an idea he was going into 52nd Street.

Q. That is all you knew?

A. Yes, by the Luckenbach docks.

Q. Did you know whether he was going to the inner berth or the outer berth?

A. The inner berth.

Q. You knew that?

A. Yes.

45 Q. How did you get that information?

A. Because there is a dump on the outside, City dump.

Q. How did you know you were going to the 52nd Street Pier?

A. Because he told us when we went in to go down from there——

Q. From Fletcher's?

A. Hoboken, yes.

Q. Did you take Robert Nielson down to Fletcher's?
A. I don't remember.
Q. Wasn't he aboard your tug going down?
A. Yes, he was on there.
Q. And then he went from the tug on the ship?
A. That is right.
Q. Captain, who was the tugboat captain of the DAUNTLESS #9 at that time?
A. I don't know.
Q. Do you know who the mate was?
A. No.
Q. Do you know who the deck hands were?
A. No.
Q. Would you know the men if you saw them?
A. It is so long ago I don't remember.
Q. Would you recognize any of them?
A. Probably.
Q. Do any of them work for Dauntless now?
A. Yes, I believe one of them is still there.
Q. Which one is that?
A. I think the Captain on there.
Q. He is still with Dauntless?
A. Yes.
Q. He was the Captain that day?
A. That I couldn't say.
Q. Didn't the pilot tell you as you were approaching 52nd Street that he was going to warp the ship in around the southerly end of Pier 1?
A. No.
Q. And that he wanted the ship to drop down around midships, and rest her against the south corner of Pier 1?
A. No.
Q. He didn't tell you that?
A. No.
46 Q. Before you got near to Pier 1?
A. No, he didn't tell me.
Q. Did you have any difficulty while you were approaching the pier, and coming down the Bay Ridge Channel?
A. No.
Q. Everything seemed to be all right?
A. Seemed to be.
Q. You were headed into the wind at that time, weren't you.
A. Partly, yes.
Q. The wind wasn't affecting you too much, was it?
A. I wouldn't know that.

The COURT: Didn't the ship protect you from the wind?

The WITNESS: Yes, I was on the lee side.

Mr. FLEISCHER: Well, actually they were heading into the wind too.

The COURT: Yes, the stem, as I recall the stem of the tug was 75 feet aste[illegible] of the stem of the ship.

Mr. FLEISCHER: That is what he testified to.

The COURT: That is his testimony. So that as the positions were described I drew the inference that the tug was to some extent protected from the wind, from the full force of the wind by the ship.

Mr. FLEISCHER: That may not be entirely true, your Honor, because as you know the bow has a flare which comes around, and the tug is low down, so there would be very little of the ship which would protect the tug against the wind.

The COURT: What do you say about that?

The WITNESS: The ship took the wind off of me.

Q. It was a southwesterly wind?

A. When we come down the ship was protecting me from the wind.

47 Q. But there was wind there, and you knew that, didn't you?

A. Yes, sir.

Q. And you knew that as you were coming down the channel, as you were coming down Red Hook Channel under Governor's Island before you got to this place, you knew there was a wind blowing?

A. Yes, but I was alongside.

Q. I mean even before you went alongside.

A. Yes, the wind was blowing.

Q. You knew that, you felt that wind?

A. Yes.

Q. How strong was that wind?

A. Around 25 or so.

Q. And then you made up on the side of the ship, on the port bow?

A. Yes.

Q. And you continued down, rode along with the ship up to about Pier 1. Will you tell us, Captain, describe how the ship started to turn into the slip, how the ship shaped up?

A. Well, they started her right straight, and then she went in the middle, or in between the two slips, and then she started to sag down on the corner of Pier 1.

Q. Is it your testimony that she was lying straight into the slip, or was she coming at an angle?

A. She was coming at just a little angle, just a little.

Q. And the Dauntless #9 was working on the stern?

A. The other Dauntless tug was on the stern, yes.

Q. And everything was all right up to that point, as far as you know?

A. As far as I know, on my side it was all right.

Q. At this point about how far was the ship from Pier 1, from the south side of Pier 1?

A. I do not understand you.

Q. The port side of the ship, how far was it from the south side of Pier 1, just at that time we are speaking about when everything was all right and you were turning into the slip?

48 A. We wasn't in to the pier then; we was on the outside, in between the slips.

Q. You were in the slip?

A. Yes, just in with the bow?

Q. In with the bow?

A. Yes.

Q. About how far off from the south end of Pier 1 were you at that point?

Mr. LYNCH: Was he or was the ship?

Q. Was the ship, that was my original question.

A. I don't know, probably about 50, 75 feet, 75 feet probably.

Q. Was it more than 75 feet? Could it have been 100 feet?

A. I do not think it was much more.

Q. What was the position of your tug at that time?

A. Alongside the ship.

Q. And what angle did she make with the side of the ship?

A. She was just a little on an angle going in the slip.

Q. Could you tell us how much of an angle?

A. No.

Q. Was it about 30 degrees?

A. Probably.

Q. Or 45? Could you tell us?

A. No, I do not think it was that much.

Q. About 30 or 35?

A. In that neighborhood.

Q. How were your engines going at that time?

A. My engines were going ahead full speed.

Q. How was your wheel?

A. My wheel was hard left—no, hard right.

Q. Hard right?

A. Hard right.

Q. And you were only about 30 to 40 degrees on an angle with the ship?

A. That is right.

Q. Then what happened?

A. Well, he started to go in, and he started to fall down on the pier, and I had orders from the pilot to give her an extra
49 jingle, and I give her all she had.

Q. What happened after you gave her all she had, did she swing around any more, did she make a bigger angle with the side of the ship?

The COURT: Instead of calling her she, describe what craft you are referring to.

Q. Did the DAUNTLESS #6 make a larger angle with the side of the ship?

A. No.

Q. She didn't?

A. No.

Q. Were the lines holding her from swinging out?

A. No.

Q. Now, you testified that you gave an extra jingle on your engines?

A. That is right.

Q. Which means give her all she has got, is that right?

A. Yes.

Q. In the way of power, is that correct?

A. Yes.

Q. And she didn't swing out any more on a hard right wheel?

A. She was coming up all the while.

Q. And she didn't swing out any further on a hard right wheel?

A. Very little.

Q. Then what happened after that?

A. Then the ship started to sag down, and I seen that we were going to get squeezed, so I straightened up alongside the ship and slacked my line off.

Q. Which line did you slack?

A. The spring line.

Q. What about the head line?

A. The head line, she was plenty slack, and I slacked my spring line.

Q. Did you let it go?

A. To get away from her as fast as I could, but the ship went down fast, and of course jammed me up against the corner.
50 Q. Did you try to go forward?

A. That is the only way I could get out.

Q. Going forward?

A. That is right.

Q. Did you go forward?

A. I did, yes.

Q. How far did you get?

A. Probably got around 30 feet or so.
Q. And you didn't try to go back?
A. I couldn't go back, no.
Q. You went about 30 feet forward, which would bring your stem of the DAUNTLESS #6 about 45 feet aft of the stem of the ship, is that correct?
A. Yes, he was—about that, yes.
Q. And that is where you were jammed in?
A. That is right.

The COURT: When you were jammed in what was the position of the DAUNTLESS 6 with respect to Pier 1? That would be the south side of Pier 1 I presume.
The WITNESS: Yes. I was right alongside of her, side by side.
The COURT: How far in from the end of the pier?
The WITNESS: Oh about, I should — around 50 to 60 feet.

Q. At the bow?
A. Yes, my bow was inside the end of the pier.
Q. I just want to understand that, you say that the bow was 60 feet in from the end of the pier?
A. My bow.
Q. Then was part of your tug protruding out into the stream?
A. That is right.
Q. Did you get any orders from the pilot to let go the lines and get out?
A. No orders.
51 Q. What is a boat captain's first duty, or to whom does a boat captain owe his first duty, Captain?

Mr. LYNCH: I object to that, your Honor, I do not understand what that question is all about.
The COURT: Are you trying to get the law from the Captain?
Mr. FLEISCHER: Well, I think it is custom or practice.
The COURT: You might phrase your question differently then.
Mr. FLEISCHER: All right, sir.

Q. Under the practice of seamen and pilots and masters will you tell me what the first duty of a master is, to whom the master owes his first duty?

Mr. LYNCH: Again I object, I think that is a question for your Honor to decide, and not get the opinion of this witness.
The COURT: I am afraid it is. Is it a matter of——
Mr. FLEISCHER: I think it is a matter of custom.
The COURT: Is it a matter of statute or navigation laws?
Mr. FLEISCHER: I am not prepared to say whether it is, but I think it is largely a matter of instruction or teaching.

The COURT: Well, I do not think—if you want to establish a custom you may, go ahead.

Mr. FLEISCHER: I want to know whether the witness is aware of that.

The COURT: But you haven't asked him about the custom.

52 Mr. LYNCH: If your Honor please, it seems to me that your Honor has to decide whether what was done here was or was not in the exercise of discretion and sound seamanship, and that is our question, and not what a master's duty is to his ship.

The COURT: I think so too.

Q. Captain, isn't it customary in the harbor and in boating in general that the master owes his first duty to the safety of his own vessel and his crew?

A. To a certain extent, yes.

Q. Isn't that his first duty?

A. Yes.

Q. In every extent?

A. Yes.

Q. The safety of the men aboard his boat?

A. Yes, and that was why I slacked the line to get away from there.

Q. And you were aware of this custom or this practice, were you not?

A. But we had a pilot on the boat to guard me as well against anything that was going to happen with the tug. He was to give me orders when to go ahead and when to come back. He was docking the ship.

Q. But if your tugboat is standing in danger, do you not owe your first duty to the crew and the boat?

A. Yes, but she wasn't in danger at that time when we come into there.

Q. What time are you referring to, when she came into the slip?

A. When she first came inside the slip.

Q. When he first came into the slip?

A. When he first came into the slip.

Q. The ship was not sagging then?

A. No.

Q. Then she was not in danger?

A. No.

The COURT: You think that the danger arose when the ship sagged down?

53 The WITNESS: Yes, that is the time, that was the start of it, yes.

Q. And you were aware of the ship sagging down?

A. Yes, that is why I slacked the line and tried to get away from there.

Q. But you could see her sagging down?

A. It came so fast I couldn't get away from there.

Q. But you could see her sagging down, couldn't you?

A. The ship generally comes down in towards the slip.

Q. Captain, is there anything which the pilot did which you think was wrong?

A. I would not know, I am down on the tug and he is up on the ship, and I do not know what the condition is up there.

Q. You could see the slip, couldn't you. You saw it when you were going in there?

A. Since, yes, but not before.

Q. All right. And you saw the size of the ship, you knew what kind of a ship it was, you knew she was light, high out of the water, and you knew the condition of the wind and the tide, didn't you.

A. That is right.

Q. Knowing all those things can you tell us anything that the pilot did which was wrong in trying to bring that ship in?

A. I don't know, that is a matter for a pilot, he is the one that decides those things, that is his judgment.

Q. All you knew was that your tug couldn't help the ship?

A. That was all I knew.

Q. Couldn't help the bow of the ship from sagging down?

A. The ship come right down on us.

Q. You knew that the tug couldn't help the bow of the ship.

A. It come right down on us.

Mr. FLEISCHER: I think that is all.

54 REDIRECT EXAMINATION.

By Mr. LYNCH:

Q. Captain, I believe you told Mr. Fleischer that it was not possible for you to go back. Why wasn't it possible to go back?

A. For one reason because she had come full speed ahead, and was doing all she could do to hold her against the wind and the flood tide, and from going full speed ahead to go full speed astern, that gives the wind and the tide more chance to fall down on the dock with me, that is for the ship to fall down on the dock with me. And that is why I had to go ahead, and not back. I was going ahead to hold her off the dock, and get away from her.

Mr. LYNCH: At this time, if your Honor please, I would like to put in the record this fact that Julius Olsen, the deck hand who

was on the #6 was a very elderly man at the time of the accident, and since then has been ill, and particularly mentally ill; he is senile. So it wouldn't be possible to produce him here as a witness.

The COURT: Very good.

Mr. FLEISCHER: May we have his age?

Mr. LYNCH: I am told he is about 73.

Mr. FLEISCHER: At this time?

Mr. LYNCH: At this time.

Mr. FLEISCHER: That would make him about 66 in 1946?

Mr. LYNCH: Right.

If your Honor please, I would like to rest at this time on the prima facie case. However I understand that Mr. Fleischer has subpoenaed certain records of the Dauntless Line, this Tug #6, and has also subpoenaed the docking pilot, Robert Nielson.

55 Now, if he doesn't put him on the stand or refer to the documents which he has subpoenaed, I would like to reserve my right to put the documents in and take the testimony of Mr. Nielson.

The COURT: All right.

Mr. FLEISCHER: I haven't had an opportunity yet to see the documents. I was waiting for you to present your case.

The COURT: Well, under those conditions the libelant rests.

We will take a recess now until two o'clock.

AFTERNOON SESSION

CHRIS NIELSON, called as a witness on behalf of the respondents, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. FLEISCHER:

Q. Mr. Nielson, are you here under subpoena?

A. Yes.

Q. Served by the United States Marshal, was it?

A. I believe so, yes.

Q. Will you tell us what your connection with the Dauntless Towing Line is?

A. I am a partner.

Q. And are you related to Robert C. Nielson?

A. Yes, he is my son.

Q. Would you also tell us what other partners of Dauntless Towing Line are related to your son, Robert C. Nielson?

56 Mr. LYNCH: If your Honor please, I have entered an objection on Mr. Fleischer's examination before trial as to all

of this as irrelevant to the issues that we are trying, and I would like to renew that now and have it on the record for the trial

The COURT: What is the relevancy?

Mr. FLEISCHER: Your Honor, in connection with the pilotage clause and our contentions with respect to the pilotage clause that it was invalid and against public policy and void and unenforceable, we contend that it is a fiction which has been set up, and we desire to show all the factual circumstances that we can which would indicate that this is an unenforceable clause and against public policy in general if strictly construed. It is a clause devised by the towboat company and imposed upon the owners, and we would like to be able to develop all the facts which are at all relevant to showing the fiction of this clause.

The COURT: How does that stem from the makeup of the company?

Mr. FLEISCHER: Your Honor, normally I wouldn't have taken Mr. Nielson's testimony first. The pilot is Robert C. Nielson, and he is the man who Mr. Lynch will contend was the servant of the United States of America when he went aboard the bridge of this ship and under the terms of the so-called pilotage clause he will claim that.

Now, we would like to show that in fact and in law it is unreal to have a situation like that where a man who is employed in the general employ of a company who has the interest of this
57 company presumably at heart, who is not only an employee of the company but is related to members of the company, we would like to have all those facts come in.

The COURT: The witness says that the pilot was his son.

Mr. FLEISCHER: I am not objecting to that. Mr. Lynch objects to my further questions.

The COURT: I understand that, but you are asking for the full names of the partners in the company. What has that to do with it?

Mr. FLEISCHER: The partners that are related to the same boy, that is just a factual matter.

The COURT: A factual matter, but factual matter may not always be relevant and material.

Mr. LYNCH: If your Honor please, we are trying to try a very simple case here under the pilotage clause, and I think all of this that is dragged in has nothing whatever to do with it at all. When Mr. Fleischer talks about the pilotage clause not being valid, as your Honor well knows there are so many decisions, and particularly in the Supreme Court, holding its validity, that this cross-examination is all whistling in the dark.

The COURT: I cannot see that this question is proper at all; I will sustain the objection.

Mr. FLEISCHER: As a preface, or further argument, your Honor, I mean to this general trend because the question may come up again in some of the other questions that I have in mind, the libelant would have the Court depend upon the pilotage clause to impose liability on the shipowner. However, the pilotage clause is
58 part, only part of an overall contract, or overall arrangement, overall means of doing business. And I think that in order to have all the facts and all the information before the Court we have to go through the background and see whether it is possible under those circumstances to sustain such a pilotage clause.

The COURT: I have sustained the objection.

Mr. FLEISCHER: Yes, sir.

Q. Is Robert C. Nielson employed by the Dauntless Towing Line?

A. Yes, sir.

Q. What was his job in April, 1946?

A. He was a Captain down there and dispatcher.

Q. By dispatcher do you mean tug dispatcher in the office?

A. Yes.

Q. What were his duties as tug dispatcher?

A. Receive orders and give out orders to the tugs.

Q. And was he also an extra Captain did you say?

A. Yes, sir.

Q. As extra Captain what were his duties?

A. In case anybody got sick or something happened, he had to get off in a hurry, one of the captains had to go to some place, he would take the place of the captain.

Q. Was he ever sent aboard a ship to direct the docking or undocking operations?

A. Yes, he would do that.

Q. What compensation did he receive from Dauntless Towing Line?

A. None, only his regular wages, monthly wages.

Q. He received monthly wages?

A. That is right?

Q. That was for his services as tug dispatcher?

A. Yes, sir, all around, whatever was to be done.

59 Q. Did that also cover his services as a relief captain?

A. Yes, all that he did.

Q. Did it also cover his services when he went aboard a ship to direct docking operations?

A. No.

Q. When he went aboard a ship to direct a docking operation, he left your office, did he not?

A. Yes.

Q. Was any reduction made in his salary for the time that he left the office?

A. No, because there were lots of times he had to go out; you have got to take the good with the bad.

Q. Wasn't he sent out on these docking operations by your office?

A. Yes.

Q. And you did not make any reduction in his salary for the time that he was outside of the office, while he was on the bridge of a ship?

A. No.

Q. His salary remained the same?

A. Yes.

Q. Mr. Nielson, would you tell us how your towboat company was engaged to handle the shifting operation, I mean how is a job obtained, or how do you receive a job, by mail?

A. By phone, they call us up and give us the name of the steamer, and where to dock it.

Q. Who would call up?

A. The steamship company.

Q. What would they ask for?

A. They would ask for the dispatcher.

Q. And what would the order consist of?

A. Where the steamer was, where to dock it then.

Q. And the name of the steamer?

A. Yes.

Q. And the time approximately?

A. The time, yes.

Q. And that is all?

A. That is all.

The COURT: Was nothing said in such a conversation about the pilot who was to go aboard the ship and dock the vessel?

60 The WITNESS: Yes.

The COURT: What was said?

The WITNESS: Well, if a pilot wasn't needed they would tell us so.

Q. Who had the talk with reference to this vessel, the CHRISTOPHER GALE, who had the talk in your office about that vessel?

A. Why, I wouldn't remember what the conversation was at that time, but there are times when they do not need a pilot, a Sandy Hook pilot, if the captain of the steamer has a license, and so forth, and is properly qualified to take the ship in and out, they can do it without a pilot.

Q. And that is the only time that they discuss the pilot?

A. Yes, they only tell us when they do not need a pilot; otherwise we know that they want a pilot.

Q. Otherwise there is no other discussion about it, it is just understood?

A. Yes.

Q. And they tell you whether or not the vessel is going to use its own power or not?

A. That is right.

Q. Mr. Nielson, how many years have you had experience around New York Harbor?

A. Since April, 1903.

Q. Have you done tugboat work yourself?

A. Yes, I have.

Q. And you understand the operation of tugs?

A. I do.

Q. Will you state to me whether a tug used for docking a vessel which is as long as 113.5 feet and as narrow as 21.5, with a horsepower of 387 would that be an unwieldy type of tug to use, would that affect her maneuverability in any way?

A. Well, we used that tug for a good many years and never had any trouble.

61 Q. You know most of the tugs around the harbor, do you not?

A. Yes, sir.

Q. That are used for transport work?

A. Yes, sir.

Q. What would you say was the average length of the tugs in this harbor for the use in transport work?

A. Well, I guess the average length is about 100 feet, probably.

Q. And there are many that are below that?

A. Some below and some over.

Q. Are there many above 100 feet?

A. Oh, yes, quite a few.

Q. Can you name any of them?

A. Moran has got a few that he uses for transport work.

Q. Do they have low horsepower or high horsepower?

A. In later years, since we got the Diesels they have more horsepower.

Q. They have a fairly high horsepower, don't they?

A. That is right.

Q. And don't they have a larger beam than 21 feet?

A. Oh yes, sir—well, about 22.

Q. Would that not be closer to 25, 24 or 25? As they got up above 100 feet?

A. When they get up above 100 feet, maybe.

Q. Then they would have a beam close to 25 feet?

A. Probably.

Q. Wouldn't you say that a shorter tug is more maneuverable than a longer tug in transport work?

A. It probably would be, yes.

Q. Who decides how many tugs are going to be used on a particular job?

A. That is generally left to the towboat captain.

Q. You mean the man that goes up on the bridge?

A. Yes.

62 Q. And he usually knows the type of tugs, he is an employee of the company, isn't he?

A. Yes.

Q. And he knows the horsepower, doesn't he?

A. Oh, yes.

Q. And he knows what kind of captains are handling them?

A. Yes, he does.

Q. Do you get weather reports regularly in your office?

A. Yes, we do.

Q. And they are made available to all these tugboat captains and the pilots?

A. We have them in the office, yes, we get them over the radio.

Q. And if the tug master feels that he needs another tug he can always call for it?

A. That is right.

Q. Even if he radios through one of his tugs to the office, one would be sent?

A. Yes.

Q. Mr. Nielson, how are charges made for these tugs, does it depend upon the type of tug used, or is it the same regardless of size for each tug?

A. For each tug.

Q. So that a tug that had a horsepower of 900, or a tug that had a horsepower of 387, you would receive the same service charge for the time put in by that tug?

A. Yes.

Q. Regardless of the horsepower?

A. Yes.

Q. When the towboat captain goes on the bridge of the ship I understand that it is the custom in this harbor that he receive a gratuity or tip, is that correct, from the steamship company I should say?

A. Yes, he gets a certain amount.

Q. Is that money paid to him directly by the steamship company?

A. Yes.

Q. And what does the pilot do with that money?

A. Spends it I guess.

Q. Do they turn it in to you?

A. No.

63 Q. They do not account to the Dauntless Towing Line?

A. No, the towboat company has nothing to do with it.

Q. I just want to get the question clear: In the case of Robert C. Nielson, has he received any compensation as a pilot?

A. Not from the towing company.

Q. Or docking master, when he went aboard a ship has he received any compensation from the steamship company?

A. I believe so, yes.

Q. Did he turn the money, or any of that money in to you?

A. Not at all.

Q. To the Dauntless Towing Line, that is what I mean when I say you.

A. No, he wouldn't.

Q. On April 6, 1946, Mr. Nielson, did Robert C. Nielson have any financial interest in the Dauntless Towing Line?

A. None at all.

Q. Did he have any financial interest in any of the tugboats owned by the Dauntless Towing Line or operated by the Dauntless Towing Line?

A. No.

Q. Did he receive any extra compensation other than his salary?

A. No.

The COURT: You mean from the Dauntless?

Q. From the Dauntless?

A. No.

Q. Does he have a pension provided for him by the Dauntless Towing Line?

A. No, I do not think so.

Q. You say you do not think so?

A. No.

Q. Mr. Nielson, could you tell me what the compensation paid to Robert C. Nielson was in 1946 by the Dauntless Towing Line?

Mr. LYNCH: If your Honor please, I think we are going very far afield here; I do not see that what compensation was paid
64 by Dauntless to Robert C. Nielson has to do with this case.

The COURT: I do not either.

Mr. FLEISCHER: I realize it is a little afield at the moment, because of taking this witness out of turn. I perhaps could have shown a better connection had I had the pilot Mr. Nielson on the stand first, which I had intended. However, I wanted to accommodate both Mr. Nielson and Mr. Lynch, so I have Mr. Nielson on the stand now.

Mr. LYNCH: I think the same objection would apply to these questions to Robert C. Nielson. What business is it to the Government what this man was being paid.

The COURT: I take that view of it, Mr. Fleischer; it is a clear

cut issue: Once this employee of Dauntless Company steps on the bridge of the ship as pilot of the ship he occupies an altogether entirely different position from that of an employee of Dauntless, and in consequence his salary as an employee of Dauntless has no bearing on his status as a pilot, nor on the rights and obligations between the ship and the towing company.

Mr. FLEISCHER: I agree with that, your Honor, if the pilotage clause is entirely valid and stands as such.

The COURT: But the salary of the employee isn't going to aid in determining the validity of the pilotage clause.

I will sustain the objection.

Mr. FLEISCHER: Before your Honor rules on it I would like to add one point, if I may: The contention will be made, and it is well-known in the harbor, your Honor, that one of the
65 reasons for sustaining the pilotage clause is that when a man goes up on the bridge he receives a separate compensation, and it is paid to him. They are very careful about that. They have it paid to him directly by the steamship company, and on the surface the tugboat company appears not to have any connection with that fund. I think I may have some information, sir, that they do have some connection with that fund in this case, and that is what I am trying to determine.

The COURT: You can't get it by asking what his salary was. If you want to recall this witness after putting in some basis for the question I will permit you to do that, but at the present moment I sustain Mr. Lynch's objection.

Mr. FLEISCHER: I suppose I could ask the witness whether a certain sum was his salary for that year.

Mr. LYNCH: That is trying to get in through the back door.

Mr. FLEISCHER: I could then lay the foundation to show that all these fees were paid back to Dauntless.

The COURT: Certainly, you can ask the Luckenbach Company to say whether they paid that pilot any money, and you have got the man himself, the pilot, to show whether he got that money and whether he paid any of it to the Dauntless Towing Line.

Now, this witness has testified that when the pilot is on the bridge acting as a pilot there is no deduction made from his salary, and that is as far as I will allow the examination to go in that respect.

66 Mr. FLEISCHER: The respondent was asked to produce, under subpoena, the payroll records of Robert Nielson for 1946. May I be permitted to see those records?

Mr. LYNCH: We have brought those under the subpoena, but I still insist it has nothing to do with this case whatever, whether he was paid $20,000, $2,000 or $3500.

The COURT: I agree with that.

Mr. LYNCH: So I object to any demand for such records.

The COURT: I sustain the objection.

Mr. FLEISCHER: I anticipated an uphill road on this; I know it is a difficult situation to put over.

I would call your Honor's attention to the one case that was in the Supreme Court of the United States, the Sun Oil Case, I believe, versus Dalzellance, on the pilotage clause, and that was a situation where the ship was also proceeding in the stream, in the channel in the harbor, and stranded. That was a pilotage situation; that was pilotage in the true sense of the word. But here a man is on a ship, and has ordered tugs around, telling them what to do, making it possible for the towboat company to earn the money that is earned for the use of those tugs, using his special knowledge as pilot while in the employ of the towboat company, and because of his connection with the towboat company, because he knows the condition of the tugs and the condition of the weather and tide, and because he knows the men on the tugs, they order whatever tugs he thinks are necessary. Now that we say is not pilotage, and we say
67 further that that cannot conceivably change the employment of this man. At that point he is not an employee of the shipowner, and it would be entirely against public policy to divest liability.

The COURT: How many captains has the ship at that moment?

Mr. FLEISCHER: She has got the pilot and the master.

The COURT: Can the master overrule the pilot?

Mr. FLEISCHER: Yes.

The COURT: Not when he is giving orders with respect to the maneuvering of the ship.

I will sustain the objection.

Q. Mr. Nielson, isn't it true that the signals given by the pilot to the tugs in maneuvering the ship in and out of a dock are special signals known to the tug and the pilots in the harbor?

A. That is right.

Q. And not necessarily known by other men, isn't that right?

A. That is right.

Q. How are those signals given?

A. By whistle or by hand.

Q. Mouth whistle?

A. Yes, mostly.

Mr. FLEISCHER: Your Honor, rather than take up the Court's time I would like to do this. May I reserve the right to read into the records from this examination before trial anything that I come upon later on when Mr. Nielson isn't here?

Mr. LYNCH: Yes, subject to the objections we have taken or may want to take, as objections were reserved on the examination before trial.

68 Mr. FLEISCHER: Yes, sir. I may not be able to cover them all, that is why I say that.

The COURT: All right.

Q. Mr. Nielson, from whom did you purchase the DAUNTLESS #6?

A. I think it was the Potter Transportation Company.

Q. What year was that?

A. I think it was in 1928.

Q. Do you know what type of work Potter Transportation did around the harbor?

A. They were connected wi[th] Shewan's Shipyard, and they were towing barges and shifting ar[ound] the shipyard with it.

Mr. LYNCH: Shifting ships [a]round the shipyard?

The WITNESS: Shifting ship[s] around the shipyard, yes, sir.

Q. But their work was general harbor work?

A. Yes.

Q. Coastwise towing?

A. And coastwise, yes.

Q. Do you know what work she did before she was with Potter Transportation, that is the DA[UN]TLESS #6?

A. I believe she was some s[or]t of police boat down in the oyster beds in Chesapeake Bay.

Q. They did not use her for any towing jobs down there, did they?

A. I do not know whether they did or not.

Q. When you purchased the DAUNTLESS #6 from the Potter Transportation Company did you make any changes in her design?

A. Yes, I believe we comp[le]tely repaired her, whatever was needed.

Q. Did you make any changes in her design at all, Mr. Nielson?

A. No, but I think we put in a steam steering gear in her, and things like that, electric lights. We done quite a lot of repairs to her.

69 Q. Did you make any change in the pitch of the propeller?

A. That I don't remember.

Q. Did you make any change in the size of her rudder?

A. Yes, we did that.

Q. What change?

A. Larger rudder.

Q. How large was the rudder?

A. I don't know. I wouldn't know that now.

Q. Did the DAUNTLESS #6 have radio apparatus or radio equipment on April 6, 1946?

A. I do not think so, no.

Q. She is listed in the book of Merchant Vessels, 1945, as having a radio signal.

A. Well, maybe she did.

Q. Mr. Nielson, if you are given a shifting job by a steamship company and don't have enough tugs available of your own, or don't have the type of tugs around that you want to use, do you have any working arrangements with any other companies to use their tugs?

A. Well, it is a common practice because sometime or other you are caught with not enough tugs, and you have to get them from other companies, when they have them handy.

Q. You did have such an arrangement on April 6, 1946?

A. Oh, yes, sir, we could call on any other towboat company who happened to have any.

Q. Did Robert C. Nielson turn in a report to you about the accident and damage to the DAUNTLESS #6 on April 6, 1946?

A. I believe he did, yes.

Q. Have you got that here?

A. Have you got it?

Mr. LYNCH: If your Honor please, I think Mr. Nielson is mistaken about that. The only report that was made was by Captain Bergsted on the so-called damage report. There was no report made by Robert Nielson. He did however later on make a statement to me, and I think that Mr. Fleischer—well, maybe we can put those together and get somewhere.

Mr. FLEISCHER: There was no statement made to the Dauntless?

Mr. LYNCH: No damage report made to Dauntless except by Bergsted, the Master of the #6.

Q. Captain Nielson, isn't it true that two tugs are usually used as teams or pairs in doing transport work for docking work and undocking work?

A. Well, that all depends upon how many tugs are needed; sometimes there is only one tug needed.

Q. Let us assume a ship approximately the size of the CHRISTOPHER GALE, and she requires only two tugs; are there not usually certain teams of tugs that are used, at least wasn't that true in 1946?

A. No, not necessarily.

Q. Wasn't it usual that tugs #7 and #9 worked together, and 9 and 11 worked together?

A. Not necessarily, no.

Q. Didn't they do that very often though, didn't they do many jobs together?

A. Oh, that might be.

Q. Can you tell me what the horsepower of the #7 is?

A. Why, I think it is 650.

Q. And the horsepower of #11?

A. Number what?

Q. No. 11.
A. Eleven, she is 650.

Mr. FLEISCHER: Would it be possible to ask your Honor to have the payroll records remain available during the course of the trial in the event that subsequently they may be called upon for them?

The COURT: Certainly.

71 Mr. FLEISCHER: I think then with that we can excuse the witness for the time being, and possibly refer back to the examination before trial if need be.

The COURT: All right.

CROSS EXAMINATION.

By Mr. LYNCH:

Q. Captain, isn't it only in recent years that the tugs used in transporting around the harbor have been high horsepower? Isn't it only in recent years that the tugs used in transporting around New York Harbor are of high horsepower?
A. That is right.

The COURT: By recent years, how far back do you go?

Q. For the past six or eight years?
A. About that, about eight years.
Q. That is the tugs built since then have been of higher horsepower than prior to that time?
A. That is correct.
Q. And isn't it true also that most of those built have been Diesels?
A. That is right.

Mr. LYNCH: That is all.

REDIRECT EXAMINATION.

By Mr. FLEISCHER:

Q. Captain Nielson, are you able to tell us what the average horsepower of a tug doing transport work in New York Harbor was in 1946, April, 1946?
A. Around 400 horsepower.

The COURT: How much?
The WITNESS: Between four and five hundred horsepower.

72 Q. That is the average, you say?
A. Yes.

Mr. FLEISCHER: That is all.
Mr. LYNCH: That is all.

(Witness excused.)

ROBERT J. TARR, called as a witness on behalf of the respondent, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. FLEISCHER:

Q. Mr. Tarr, will you tell us please what your present occupation is?

A. I am Acting Operating Manager of Luckenbach Steamship Company.

Q. Were you with them in 1946?

A. I was.

Q. What was your position on April 6, 1946?

A. I was assistant to the operating manager.

Q. In the course of your duties as assistant to the operating manager were you called upon to make arrangements for the shifting of vessels?

A. I was.

Q. Did you make arrangements for the shifting of the CHRISTOPHER GALE on April 6th? Did you make the arrangements on April 5th or 6th of 1946 so that she would be shifted from Fletcher's Hoboken to 52nd Street Pier in Brooklyn on April 6, 1946?

A. I made the arrangements for the ship, yes, sir.

Q. Will you tell us in your own words how those arrangements were made, what was said?

A. Those arrangements were made by a telephone call to the Dauntless Towing Line, and I contacted whoever was the dispatcher for them at that time, and gave them the particulars of the
73 intended shift, the name of the ship, her location at that time, where she was to be shifted to, the time of the shift, and any particulars as to whether she has her full power, or there may be a boiler cut out. And that is the way the order is given.

Q. And that was given to the tug dispatcher over in the Dauntless office?

A. That is correct.

Q. And did Luckenbach have a working contract with Dauntless Towing Line?

A. We have.

Q. And you had at that time?

A. We had at that time.

Q. Are they handling all of your work?

A. All of our work.

Q. And you did not know what they were going to use in the way of tugs, whether it was their tugs or other companies' tugs on the job?

A. We did not.

Q. And you made no arrangements as to the number of tugs that were going to be used?

A. We left that to the discretion of the Dauntless Towing Company.

Q. Did you know what tugs were going to be used, which tugs were going to be used?

A. We did not. The shifts were arranged for as much as a day before the intended move, and it depended upon what tugs were available. That was the problem of Dauntless Towing Line rather than ours.

Mr. FLEISCHER: That is all, your witness.

CROSS EXAMINATION.

By Mr. LYNCH:

Q. Did you personally make the arrangements with Dauntless for the towage of this CHRISTOPHER GALE?

A. I did, sir.

74 Q. Do you remember who at Dauntless you spoke with?

A. I do not recall to whom I spoke.

Q. At the time that you called them up you were aware of the terms of this so-called pilotage agreement, and the conditions of towing weren't you?

A. I was.

The COURT: By that you are referring to Libelants' Exhibit 1?

Mr. LYNCH: Yes, your Honor.

Q. One other thing, in arranging for a towage of this sort I understood you to say that you depended upon Dauntless to furnish a sufficient number of tugs to carry out the job?

A. That is correct.

Mr. LYNCH: Thank you, that is all.

(Witness excused.)

ROBERT C. NIELSON, called as a witness on behalf of the respondents, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. FLEISCHER:

Q. Captain Nielson, are you here under subpoena?

A. I am.

Q. Will you state what your present occupation is?

A. I am a dispatcher in Dauntless Towing Line, and also pilot for Luckenbach Steamship Company.

Q. Are you on the payroll of the Luckenbach Steamship Company?

A. Not exactly on the payroll, I do a job for a set fee.

75 Q. You say you are a pilot of the Luckenbach Steamship Company?

A. Pilot for Luckenbach.

Q. For Luckenbach Steamship Company?

A. That is right.

Q. Would you mind telling us who gave you that job of pilot for Luckenbach Steamship Company?

A. Why, you wouldn't exactly call it giving somebody a job. I have been doing much of their work, and they always ask for me to do their piloting for them, ask me if I am going to be on the job.

Q. Who gave you the job of pilot for Luckenbach?

A. Nobody.

Q. And you say you are not on their payroll?

A. Not on their payroll as an employee.

Q. In other words you are not a pilot for Luckenbach Steamship Company, are you?

A. Not in the sense you are, not in the sense that I am on the payroll.

Q. And what is your normal occupation?

A. Dispatcher for Dauntless Towing Line.

Q. And you have no connection with Luckenbach Steamship Company?

A. No, not at present, none at all, no.

Q. You said your occupation for Dauntless was what?

A. Dispatcher.

Q. Tug dispatcher?

A. Yes.

Q. What are the duties that you perform for Dauntless Towing Line?

A. I receive orders from various companies that we do business with. I try to solicit orders, and when I do get an order I give the orders to the towboats.

Q. When you say orders you mean business, you get business from different steamship companies?

A. That is right, business, yes.

Q. What kind of business do you get?

A. Well, we get all types of business, steamship business,

76 barge business, scow business, ocean towing, inland towing, Great Lakes towing.

The COURT: Did you know Mr. Tarr who was on the witness stand just before you?

The WITNESS: Yes, I do.

The COURT: He said in respect to the shifting of the CHRISTOPHER GALE on April 6, 1946 that he called up someone in your office, and had a talk with that person. Do you know who that person was?

The WITNESS: It could have been I, or it could have been my partner, Mr. Miller.

The COURT: But you do not know?

The WITNESS: I do not know who took the order explicitly.

Q. You say your partner Mr. Miller; is Mr. Miller a partner in the Dauntless Towing Line?

A. No, we work together.

Q. I asked you, is Mr. Miller a partner in the Dauntless Towing Line?

A. There are three Mr. Millers.

Q. Which one are you referring to?

A. That one no.

Q. That one is not a partner?

A. No.

Q. What is his job?

A. He is paymaster.

The COURT: Why did you refer to that man Miller as a partner?

Q. Partner in what respect?

A. When I am busy on another phone he will pick up the phone; if I am out to lunch he will answer the phone; in other words he will dispatch for me when I am not there.

77 Q. What other work do you do for Dauntless, if any?

A. I make out bills and figure on different jobs when requests for bids come in, when they ask us to quote on certain towing jobs I figure out the rates on those towing jobs.

Q. And that is what you do at the present time?

A. At the present time, yes.

Q. For how many years have you been working for Dauntless Towing Line?

A. Since 1932.

Q. Going back to April 6, 1946, Captain Nielson, were your duties much the same as they are now?

A. Yes.

Q. And among those duties did you also relieve tugboat captains?

A. Yes.

Q. And handle tugboats?

A. Yes.

Q. Will you tell us what licenses you hold?

A. Master of steam and motor vessels not over 750 gross tons on the Atlantic Coast of the United States; first class pilot any steam

and motor vessel, any gross tons, Portland Harbor and its outer approaches, Glenn Harbor, Boston Lightship and on down.

Q. In other words you hold the usual pilotage licenses?

A. Yes, sir.

Q. Including pilotage in New York Harbor?

A. Yes, sir.

Q. When did you get your pilot's endorsement entitling you to act as pilot of any gross tons?

A. In 1945.

Q. Do you remember approximately what month that was?

A. It was in the early part of the year.

Q. Around March?

A. It could be around March.

Q. What other duties did you perform for Dauntless at that time, April 6, 1946, besides relieving tugboat captains, dispatching, and——

A. I did dispatching.

78 Q. Well, I mean in addition to the others that yo. have mentioned?

A. That is all.

Q. Did you go out on ships docking and undocking them?

A. Yes, sir.

Q. Did they send you out, did Dauntless send you out on those jobs?

A. I was the only one available.

Q. And you went out on those jobs?

A. Yes.

Q. And you would go aboard the bridge?

A. Yes, sir.

Q. And you would order the tugs in their maneuvers getting in and out of docks?

A. Yes.

Q. How many hours would an ordinary shifting operation take, such as the CHRISTOPHER GALE from Hoboken to Brooklyn, how many hours would that take?

A. On a job like that it would take anywhere from an hour and a half to two hours.

Q. You would be out of the office about two hours?

A. Yes.

Q. Possibly more than that?

A. Possibly.

Q. Possibly three hours?

A. Yes.

Q. Have you been out on jobs that took as long as five hours?

A. Yes.

Q. And longer?

A. Yes.

Q. And did you receive regular compensation from Dauntless Towing Line?

A. Yes, sir.

Q. Was it a monthly compensation?

A. Yes.

Q. Was it the same as received by a tugboat man hired by Dauntless?

A. At that time, yes.

Q. And your full monthly wage was paid to you regardless of how many hours you spent docking and undocking a ship while you were on the bridge of the ship?

A. Yes.

Q. Going to the particular situation that we have been discussing here, on the morning of April 6, 1946 would you tell us, Mr.
79 Nielson, how this shifting job was handled? Tell us in your own words how you got to Fletcher's, and so forth?

A. I think the job was set up for 8 o'clock in the morning, and I went by towboat; which tug I do not know, whether it was the DAUNTLESS 9 or the DAUNTLESS 6.

Q. One of them?

A. It was one of the tugs that went up to Fletcher's and I went aboard the bridge, and introduced myself to the captain, told him that I was a pilot, and placed the tugs. I do not know which dock it was up at Fletcher's, but we proceeded out of the dock without incident, and proceeded down the Hudson River.

Q. Do you recall whether she was in a narrow berth?

A. I do not really recall.

Q. Proceed, Captain.

A. Down the Hudson River to the lower end of Governors Island, into the Buttermilk Channel, Bay Ridge Channel too off of 52nd Street, Brooklyn. We got off about 35th Street, Brooklyn, when I gave orders for the Tug DAUNTLESS #6 to make fast on the port bow. I mean by making fast on the port bow, in other words that means two lines, a spring line and a backing line out to the ship. I told the Tug DAUNTLESS #9 to get on the quarter with one line.

Upon approaching 52nd Street I slowed the ship down, shaped her up to go into 52nd Street, Brooklyn. I approached to above, up to above 52nd Street, figuring on the wind and tide that would carry us down a little bit.

Q. How was the wind and tide at that point?

A. The wind was about west southwest, say moderate to fresh breeze, about a fresh breeze.

Q. How would you characterize that in miles per hour?

A. I beg your pardon?

Q. How would you rate that in miles p. · hour?

A. About 22 to 25 miles an hour.

80 Q. That is not a very strong wind, is it?

A. Well, it has been stronger. I would say it is what we would call a good breeze. There was a good breeze blowing.

Q. Go ahead, proceed. As I understand it you are off around Pier 1 now.

A. That is right, between Pier 1 and 52nd Street.

Q. And preparing for the docking operation?

A. Yes.

Q. Did you then call to either of the tugboats and tell them what your plans were as to how you were going to bring her into the slip?

A. Well, there is always like a base plan, whether you are going to start off this way or that way. And I had figured that on starting off, I figured to have the tug made up with a backing line and a spring line——

Q. Referring to the #6?

A. Referring to the DAUNTLESS #6. The DAUNTLESS #9 I would have on the quarter, and from there I would proceed, it all depends on how the ship was handling, whether I could take her straight in, or whether I would have to breast her off on the end of Pier 1.

Q. On the south corner of Pier 1?

A. Of Bush docks, Pier 1, Bush docks. I had originally turned to go straight in, but the wind had been increasing, so that during the operation I changed my plan of operation. Then I figured that the best way would be to rest the side of the ship on the end of Pier 1, and have the Tug DAUNTLESS #6 to be on the inside of Pier 1 and the DAUNTLESS #9 to be out of Pier 1 where we could get her a little bit further up, so that the wind and the tide would have a lesser target on the ship. And when I could get in that far, and that much, then we could breast the ship across the slip and get into the dock that way.

Q. In other words now that you have got the ship rested
81 on the corner of the pier you could sort of stop and breathe a sigh of relief, and then work her in from there. Wasn't that the general situation?

A. Well, you can also call it "Discretion is the better part of valor" too.

That is the way I planned it, by landing the ship on the corner of the dock and having both tugs, one on the inside and one on the outside. That is the safer way, it is also the longer way.

Q. And that was the way that you chose that day?

A. That was the way that I was endeavoring to do. I hadn't originally planned on doing it that way, but as the conditions, as we are going along on the job as the conditions change we also change our plans. And it is a situation that you can't plan ahead of time, you have got to do it as the situation develops.

Q. And you of course were giving the tugs the order to help carry out your plan?

A. That is correct.

Q. And the object of the DAUNTLESS #9 on the port quarter was to hold his stern up, wasn't it?

A. To hold the stern up.

Q. And the purpose of the #6 on the port bow was to hold the bow up?

A. That is correct.

Q. Did the #9 hold the stern up?

A. In a sort of—well, yes, it did hold the stern up, it did hold the stern up.

Q. Did the #6 hold the bow up?

A. No.

Q. And when you saw that the #6 was not holding the bow, what did you do next?

A. I gave orders for the ship to let go of the starboard anchor.

Q. Was that executed promptly?

A. Executed promptly.

Q. Immediately thereafter, was it done immediately?

A. As soon as possible, yes, as soon as it could be done.

82 Of course you can't just snap your fingers and expect to be done immediately, they still have to trip the brake and all that.

Q. You haven't found any fault with the way that they did it?

A. No, I found no fault, no.

Q. Did the anchor take hold?

A. No.

Q. What happened after that?

A. The ship continued to slide on, go sideways, and I blew for the Tug DAUNTLESS #6 to give her an extra jingle, in other words let her come full ahead as much as he could, but he wasn't able to hold it, and they were getting close to the pier. I noticed the captain of the tug then signaling his deck hand to slack off them lines; he was trying to get out of the way of the ship catching him on the corner of the dock, but he wasn't able to.

Q. Was there a lot of shouting going on around that time?

A. What do you mean by shouting?

Q. Shouting on the bridge by you or someone else?

A. No.

Q. Did you shout to the tugboat to get out of the way?

A. No.

Q. Is that because you saw him slacking his lines?

A. I could see what he was endeavoring to do, so there was no need for me to add to the confusion.

Q. In your experience as a pilot isn't it true that the tugboat is to look out for itself in these docking situations?

Mr. LYNCH: I object to that again, if your Honor please, as a question of law for your Honor's decision.

The COURT: I think so.

Mr. FLEISCHER: It is a practice, your Honor——

83 The COURT: If you can establish a custom, and if he says there is such a custom, you can bring out what the custom is.

Q. Is it a custom in the harbor of New York, or in other harbors that a tug assisting a ship must look out for itself when they stand in danger?

A. It all depends on who is on the bridge, and who is doing the docking. I have seen in my experience of being on a tugboat, I have seen some skippers of tugs break away and endeavor to avoid damages of any serious extent, and I have seen other tugs in situations where it looked real close, and the tugboat kept right with the ship, and in the final analysis they were able to overcome it.

Q. They were able to push and get out of the way?

A. That is right.

Q. In these other situations you described where they got out of the way, they were standing in danger, weren't they?

A. In mostly all of these maneuvers with these ships of all kinds, there is always that danger lurking, you see, because they are always in close waters.

Q. In other words this is a hazardous occupation?

A. It is a hazardous occupation.

Q. When the anchor didn't hold and the ship continued to drift down and the tug let go of her lines, what did the tug then do, what you saw?

A. Endeavored to move up ahead to get clear of the corner of the dock, corner of the pier there.

Q. Were her lines entirely loosed?

A. They had been slackened off.

Q. From where you were standing could you see the deck on the #6?

A. Yes.

84 Q. What was he doing with respect to the lines?

A. Throwing the turns off the bitt.

Q. How far would you say the port side of the DAUNTLESS #6 was from the south side of pier 1 at that time?

A. What was your question again?

(Last question repeated.)

A. At the time he started to slack away?

Q. Yes.

A. I would say about, between 30 and 50 feet.

Q. Immediately upon slacking the lines he started to move forward?

A. He started to move forward, yes.

Q. How much distance did he have to go in order to get safe would you say, from what you observed?

A. About 50 feet.

Q. At the time he was untying the lines and slackening the lines, what angle if any did the Tug #6 make with the port side of the CHRISTOPHER GALE?

A. When the captain anticipated the oncoming disaster, I believe he put his wheel hard left in order to——

Q. Jack-knife back?

A. Not to jack-knife back, but to swing his stern over and give him a little more room to move ahead.

Q. In other words to bring his stern back towards the CHRISTOPHER GALE?

A. Swing his stern over to go into the CHRISTOPHER GALE, in order to give him a little more clearance to shoot by the end of the dock.

Q. Before he did that, at the time you gave him the order to give his engines an extra jingle, what angle did he make with the side of the ship?

A. I would say that he was at about a 45 degree angle.

Q. Was that the largest angle that he ever made in pushing her bow over?

A. About that, yes.

85 The COURT: I wish you would take a pad and pencil and just draw Pier 1.

(Witness draws on paper.)

The COURT: When you were approaching the southerly end of that pier, where was the CHRISTOPHER GALE and the tugs?

The WITNESS: We will make this Pier 1 of Bush docks, and then we will make this—this will be 52nd Street (drawing). This would be the GALE, and that would be the #6. That would be the #9 (indicating).

The COURT: Now, indicate by an arrow the direction that you had determined upon to shift in your maneuvers to get into the slip. Indicate the direction by an arrow.

(Witness marks on paper.)

The COURT: Well, that would be heading for 52nd Street.

The WITNESS: Heading for 52nd Street.

The COURT: And instead of getting there the wind drove you towards Pier 1?

The WITNESS: That is right.

The COURT: As you were thus turned towards Pier 1 you said

something about putting #9 on the outside, do you mean on the starboard side of the ship?

The WITNESS: No, this was—we will say this is our first position (indicating).

The Court: Yes.

86 The WITNESS: This was the position that I was endeavoring to get in.

The COURT: Label that one B.

The WITNESS: B?

The COURT: Yes.

(Witness marks.)

The COURT: When you say you wanted to get one tug outside, you mean you wanted it to be outside in the river, and when you said you wanted one tug inside, you meant inside of the slip, is that it?

The WITNESS: That is right, inside would be with respect to the slip, in past the corner of that dock, that pier.

The COURT: All right, I think I understand that. Will you offer that in evidence?

Mr. FLEISCHER: Yes, that is offered in evidence.

(Marked Respondents' Exhibit D in evidence.)

Q. On this exhibit that has just been marked in evidence, in position B I notice you have the tug on the port bow at a right angle position or head in, full head on to the bow of the CHRISTOPHER GALE.

A. Yes.

Q. And that is the position that you say you wanted to get the ship in?

A. That is right.

Q. Did the DAUNTLESS #6 ever assume a position or just head on?

A. No.

Q. At right angles to the ship?

A. No.

Q. Did the DAUNTLESS #9 assume such a position on the port quarter?

A. Yes.

Q. And that is indicated by your diagram A?

A. Yes.

87 Q. Was the CHRISTOPHER GALE operating properly in all respects as far as you were concerned?

A. Yes.

Q. Were the orders that you gave both to the wheel and the engine room carried out promptly?

A. Yes.

Q. And correctly?

A. Yes.

Q. After the accident hapuened I believe the DAUNTLESS #6 got out of the way, did she?

A. She did not.

Q. She remained on the side of the pier?

A. That is right.

Q. How did you bring the ship then into the 52nd Street Pier?

A. With the other tug.

Q. The #9?

A. That is right.

Q. Would you describe how you did that?

A. I doubt if I could; this happened seven years ago, and I have had quite a few ships since.

Q. But you were able to get her in, with the use of the ship's capstan?

A. That is right.

Q. And lines?

A. Yes.

Q. And with the DAUNTLES: #9 pushing on the aft quarter?

A. It comes back to me now, I think when we rested against, after the accident we had rested against the corner of Pier 1, I think, I am not sure but I think the way I had worked it was to, I let the DAUNTLESS #9 go, and he went on the bow, and carried the line from the ship over to the dock, and then when we got that line over to the dock I sent the Tug DAUNTLESS #9 back on the quarter again, to keep the quarter up. I think that is the way I did it, but I am not sure.

Q. And pulling in the line with the ship's engines?

A. Pulling in the line with the ship's engines.

Q. And with the aid of the DAUNTLESS #9 you were able to bring her in and dock her?

A. Yes.

88 Q. Without any further incident?

A. That is right.

Q. Do you recall the condition of the tide at that time, Captain?

A. It was around the first of the flood tide.

Q. Would you be able to tell us about how much that means with respect to knots?

A. Oh, I would say about a mile an hour.

Q. Before you started to turn the vessel into the slip and thereby expose the starboard side to the winds, did you experience any difficulty at all?

A. No.

Q. Who else was on the bridge with you at the time?

A. The captain and the quartermaster.

Q. And who was on the bow?

A. I presume the mate.
Q. Do you know whether there was a mate up there?
A. I will say there was a mate.
Q. The chief mate?
A. I do not know.
Q. Was there a mate on the stern?
A. I would say yes.
Q. Captain, I would like to leave the general situation for a moment and ask you a few other questions concerning the compensation you received in the way of these fees. Did you receive fees from, or did you receive a fee from the Luckenbach Steamship Company in this instance?
A. Yes, sir.
Q. And you received others from other steamship companies?
A. Yes.
Q. In the way of a gratuity or tip, so to speak, while you were acting as pilot?
A. I don't call it a gratuity, or tip, but it is a fee, it is a set fee.

The COURT: A fee for services performed, is that it?
The WITNESS: That is correct, sir.
89 Q. Was it paid directly to you?
A. It was paid directly to me.
Q. Did you make any accounting at all for that money to the Dauntless Towing Line?
A. No.
Q. And your compensation from Dauntless had no connection with any of these sums which you received in 1946?
A. None at all. I have here a receipted voucher that I received for that particular job, along with others.
Q. Captain, you say now that this money was in no way accounted for to Dauntless?
A. In no way whatsoever.
Q. Did you account for it separately on your income tax return?

Mr. LYNCH: If your Honor please, I think that that is objectionable.
The COURT: Yes, I sustain the objection.

Q. Was the only moneys that you received in 1946 moneys received from Dauntless Towing Line?
A. I received money from Dauntless Towing Line, yes.
Q. Is that the only money you received in that year?
A. No.
Q. What other moneys did you receive?
A. Money from the Luckenbach Steamship Company.
Q. For what service?
A. For pilot services, pilotage services.

Q. Any other earnings that year?
A. No.
Q. Could you give us an estimate of the number or the amount that you received for pilotage services?

Mr. LYNCH: Again I object to that as irrelevant.
The COURT: How is it irrelevant?

(Discussion off the record.)

90 Mr. LYNCH: If your honor please, another thing I would like to add before we go further: His income tax return would not be available to a civil litigant merely because the Government is a party here, why are they able to come in and get all those things?

The COURT: I do not know, but as I indicated a moment ago, the question would be allowed merely to test his credibility, and not because the issues would be affected, except to the extent that his credibility is sufficiently impaired why that might affect the case.
Mr. LYNCH: All right.

Q. I show you a paper and ask you whether this is your signature?
A. Yes, yes.
Q. Mr. Nielson, will you state whether or not all the compensation that you received in 1946 came from Dauntless Towing Line?
A. No.
Q. Will you tell us now what other compensation you had?
A. From—

Mr. LYNCH: If your Honor please, I would like to have this witness warned that if he answers these questions he may be subject to self-incrimination. In other words it looks now like a criminal proceeding instead of a civil proceeding.

The COURT: Every witness has the right to refuse to answer on the ground that the answer would tend to incriminate him. And I tell you that. But the fact that he filed a return showing all income received was from Dauntless, doesn't mean of necessity that he filed a false return.

91 Mr. FLEISCHER: Except there is a withholding slip, your Honor, which is filed by Dauntless, which is coupled to the individual's income tax blank.

The COURT: Dauntless couldn't withhold what he got as a pilot from Luckenbach.

Mr. FLEISCHER: That may be, your Honor, but nevertheless——

The COURT: This thing would be simplified if you were able to show Luckenbach paid him anything or didn't pay him anything.

Mr. FLEISCHER: Luckenbach did pay him something for this particular job.

The COURT: It did?

Mr. FLEISCHER: Oh, sure.

The COURT: Then I think that is the end of the matter, that is all I want to know, we do not care what he did with it, that is not any concern of Luckenbach's.

Mr. FEISCHER: But I just asked whether he accounted for it with Dauntless Towing Line, and he said no, and his income tax blank shows his only compensation that year was from Dauntless.

The COURT: Maybe that is so, maybe he failed to report it.

Mr. FLEISCHER: I do not want to go further on that, this is not a criminal case.

Your witness, Mr. Lynch.

The COURT: Well, let us make some speed here. This testimony is going in very slowly.

CROSS-EXAMINATION.

By Mr. LYNCH:

Q. Captain Nielson, I understood you to say that you were a pilot for the Luckenbach Steamship Company. Do I under-
92 stand by that that you also piloted for other companies besides Luckenbach?

A. I haven't in recent years.

Q. But in years before recent years you did work for other companies as well?

A. I did pilot jobs.

Q. If anybody came along and asked for a pilot, other than Luckenbach, you would be able to pilot for them?

A. Yes.

Q. Looking at Respondents' Exhibit D of this date, will you look at the position of the ship and the tug marked A, and tell me please what part of the #6 was in contact with what part of the CHRISTOPHER GALE?

A. The bow of the Dauntless #6 was in contact with the, I wouldn't say exactly the bow, but with the forward end of the ship.

Q. About how far would you say the bow of the #6 was, that is the stem of the #6 was from the stem of the CHRISTOPHER GALE?

A. About 75 feet.

Q. As the DAUNTLESS #6 lay alongside of or head on to the CHRISTOPHER GALE, she wasn't directly horizontal, she was at an angle of about what?

A. I think I said 30 degrees.

Q. Thirty degrees?

A. About that.

Q. You also testified, Captain Nielson, that the DAUNTLESS #6 did not assume a position head on to the ship; was that because of the short distance between the side of the ship and Pier 1, or for what reason didn't she assume a position head on to the ship?

A. I can explain it for two reasons:

When the tug is made up in the fashion as the DAUNTLESS #6 was, with the spring line and backing line out, they are moving against an angle which is a little, it is like working against themselves. They are trying to push out. They have the spring line there, and I would say it is more or less like holding a ship
93 in to the pier. They are not as maneuverable on account of their being just set right there. They have very limited space to maneuver in on account of the two lines.

Q. Does it also have anything to do with the fact that the ship is moving ahead under its own power?

A. The ship would have headway yes, that would have a tendency to cut down the angle.

Q. In other words that would prevent the tug from taking up a position perpendicular to the side of the ship?

A. Yes.

Mr. LYNCH: That is all.

REDIRECT EXAMINATION.

By Mr. FLEISCHER:

Q. Is that the usual manner in which a tug would be tied up to a ship for docking?

A. That is the usual manner for a tug on the bow to be tied up.

Q. For docking?

A. For docking.

Q. After the tug hit the side of the pier did you notice any steam coming out of her?

A. Yes.

Q. Do you know what happened to cause that?

A. Yes, sir.

Q. Could you tell us?

A. I understood that the steam gauge had broken; when that broke there was live steam escaping out of the engine room, so that blew up the boiler, in other words opened up the overboard discharge to the boiler.

Q. Were you able to see what part of the #6 came in contact first with the side of the pier?

A. Just about midships, just right there, right by the boiler room.

94 Q. In other words she was almost parallel with the south side of Pier 1 when she hit the side of the pier?

A She was right on the corner, parallel to the ship.

Q. Parallel to the ship?

A. That is right.

The COURT: When you say right at the corner, you mean she wasn't in the slip?

The WITNESS: I would say the corner of the dock caught the DAUNTLESS #6 right in the middle.

The COURT: Did any part of the #6 rest alongside the south side of Pier #1?

The WITNESS: On the south corner.

The COURT: I wish you would draw a diagram and show me that. Show the position of the #6 at the time of impact.

(Witness draws.)

The WITNESS: That would be right at the time of the impact.

The COURT: Following that impact were the lines released?

The WITNESS: Yes.

The COURT: And what happened to the #6?

The WITNESS: She just laid there.

The COURT: Laid at the corner?

The WITNESS: Laid at the corner until we got a few lines on the dock to pull her back to lie on the face of the dock.

Q. Wasn't the port side broken down, wasn't there a hole made in the port side?

A. No, there was no hole made there.

Q. But she remained impaled by the corner of the pier?

95 A. More or less, yes. The plates didn't break, they just buckled.

Mr. FLEISCHER: I will ask that this paper upon which the witness drew this be marked as an exhibit.

(Marked Respondents' Exhibit E in evidence.)

Mr. FLEISCHER: I think that is all, your Honor.

Mr. LYNCH: Nothing further, your Honor.

The COURT: We will resume tomorrow at 10:30.

Brooklyn, New York, April 16, 1953.

(Appearances as heretofore noted.)

HAROLD L. POTTER, called as a witness on behalf of the respondents, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. FLEISCHER:

Q. Captain Potter, will you state what licenses you hold?

A. I hold a Master's license, unlimited ocean.

Q. How long have you held that license?

A. Since 1933.

Q. On April 6, 1946 were you the Master of the S. S. CHRISTOPHER GALE?

A. I was, yes, sir.

Q. Captain, do you recall that on that day the CHRISTOPHER GALE was shifted from Hoboken, New Jersey to 52nd Street Pier, Brooklyn?

A. I do, yes, sir.

Q. Were you aboard at that time?

A. I was.

96 Q. Where were you, sir?

A. I was at the telegraph.

Q. Were you in the wheelhouse?

A. In the wheelhouse, at the engine room telegraph.

Q. Who else was in the wheelhouse?

A. The quartermaster and the pilot, Captain Nielson.

Q. Were there other officers on the ship?

A. Yes. The chief mate was on the bow, and the relief mate acting as second mate was at the stern.

Q. Captain, I show you what purports to be the logbook of the S. S. CHRISTOPHER GALE. I am referring to the page for April 6, 1946. Is that your signature on the right-hand corner at the bottom?

A. It is, yes.

Q. Is that the logbook of the CHRISTOPHER GALE for April 6, 1946?

A. It is, yes.

Mr. FLEISCHER: Your Honor, I offer in evidence the logbook, and I would like to use a photostatic copy if that is agreeable to Mr. Lynch of that page. I do not think any other part of it is necessary.

Mr. LYNCH: No objection.

(Marked Respondents' Exhibit F in evidence.)

Q. Captain, coming down towards the 52nd Street Pier was the vessel assisted by tugs?

A. Yes, the DAUNTLESS #6 and the DAUNTLESS #9.

Q. I might go back one step and say at Hoboken did the pilot come aboard, Mr. Nielson?

A. He did, yes, sir.

Q. Was he piloting the vessel down to the 52nd Street Pier?

A. He was, yes, sir.

Q. And the two tugboats were following you down there?

A. They assisted in undocking the vessel at Hoboken, and followed the ship down.

97 Q. Then before approaching the slip between Pier 1, Bush Terminal and 52nd Street Pier, Brooklyn, did the tugboats take places alongside the CHRISTOPHER GALE?

A. I think that they took places before we got down that far; just where I couldn't say, but it was before we got to 52nd Street.

Q. Would you tell us what places the tugs took?

A. Yes. The DAUNTLESS #6 was on the starboard bow, or on the port bow, pardon me, and the DAUNTLESS #9 on the port quarter.

Q. Did you notice how many lines the DAUNTLESS #6 had out?

A. No, I wasn't in a position to see. I was at the telegraph, and couldn't possibly see the tug.

Q. Where is the telegraph situated in the wheelhouse?

A. It is on the, just to the starboard of the midship section of the vessel, in the fore and aft dimension.

Q. Will you refer to the logbook before you, Captain, and advise us after refreshing your recollection whether the steering gear, telegraph and whistles were tested before proceeding on this trip?

A. They were at 7 A. M.

Q. Will you tell us how they were found?

A. In perfect condition.

Q. Was the ship in perfect operating order throughout the shift?

A. It was, yes.

Q. Now, will you tell us in your own words what took place as you approached the slip between Pier 1 and 52nd Street Pier?

A. I was at the telegraph, and my vision wasn't too clear of just actually what did take place. But they were, I think the pilot was attempting to warp it in, that was my understanding, warp it in around Pier 1 and alongside the 52nd Street Pier. At one point I noticed the position was, the bow was inside the slip, at that time about 60 feet off Pier 1, the bow was inside the slip.

Q. She was proceeding?

A. She was proceeding.

98 Q. How was the wind condition at that time?

A. The wind was I would say between 20 and 25 miles an hour.

Q. In what direction was it blowing?
A. From the southwest.
Q. Southwest?
A. Southwest, yes.
Q. Were they approximately the same conditions that you had when you started out from Hoboken?
A. I would say just about the same.
Q. Do you recall what the tide condition was?
A. I think the tide was at early flood.
Q. Will you then continue and tell us what occurred after that, from what you could see?
A. From what I could see the ship rapidly set down on Pier 1.
Q. Was that after she turned into the slip?
A. That was in the act of turning in, yes, after she had come broadside to the wind.
Q. Yes?
A. Then the pilot ordered the starboard anchor to get go.
Q. Was that done?
A. That was done almost immediately, as soon as the chief could trip the brake.
Q. Did the anchor take hold?
A. It didn't, no, sir, apparently.
Q. What followed after that?
A. This is quite awhile ago, but to me it seemed there was two jars instead of one, it would be like the tug hitting the corner of the dock, and then the ship hitting the tug. That I can't swear to.
Q. Did you see that?
A. No.
Q. And that is what you thought occurred as a result of the sound?
A. Yes, and as a result of the jars on the ship, yes.
You would describe it as possibly the stern of the tug hitting the
Q. You would describe it as possibly the stern of the tug hitting the pier?
99 Mr. LYNCH: I haven't objected to it, but now you are telling the witness what you expect him to testify.

Mr. FLEISCHER: I was just reviewing it.

The COURT. I sustain the objection. He couldn't tell from the sound what part of the tug hit, could he?

Mr. FLEISCHER: No, he couldn't tell what part.

The WITNESS: I couldn't really tell what the bounce was there either.

Q. Would you tell us what the draft of the CHRISTOPHER GALE was during the time of this trip?

A. 7.05 forward, and 13.05 aft.
Q. What was her mean draft?
A. 10.05.
Q. Is that characterized as a light ship?
A. Yes, very light.
Q. Does that mean she is high out of the water?
A. Very high, yes.
Q. Captain, I have here a picture on a circular showing a typical Liberty ship. Is that what the CHRISTOPHER GALE looked like?
A. Well, yes, she wasn't laden that deeply.
Q. She was even higher out of the water than that picture shows?
A. Yes.

Mr. FLEISCHER: I offer that in evidence.

The COURT: You may mark it.

(Marked Respondents' Exhibit G in evidence.)

Q. All throughout this docking operation Captain Nielson was giving orders to the tugs, was he?
A. Well, yes, yes, sir, he was.
Q. Did you at any time before the contact of the ship and the tug and the pier hear any whistle signals from the DAUNTLESS #6?
A. No, I do not believe so.
100 Q. Captain, do you find any fault with the manner in which Captain Nielson handled the ship?
A. No, sir, not at all.
Q. Captain, are you going to sea at the present time?
A. No, I took relief work and night mate work in New Orleans.
Q. How is your health, Captain?
A. It is very poor. I had a kidney removed, and the company won't allow me to sail offshore.
Q. That prevents you from going to sea at the present time?
A. At the present time.

Mr. FLEISCHER: Your witness.

CROSS-EXAMINATION.

By Mr. LYNCH:

Q. Captain, at the time you left Hoboken were you satisfied with the number of tugs that were being employed to hand[illegible] ship?
A. They handled the ship very well at Hoboken, yes, s[illegible]
Q. And you did not at that time make any request or suggestion for additional tugs?
A. No, sir.

Q. After you had proceeded down the harbor with the wind blowing out of the southwest and making a flood tide, did you at that time make any suggestion or request for more tugs?

A. No. I believe the pilot knew the conditions of the typical waters better than I.

Q. And you were satisfied with the power furnished?

A. It appeared to be—yes, sir, of course the tugs hadn't been put to any real test in Hoboken, so I couldn't form an opinion.

Q. I believe you said at the time you got down off the slip between 52nd Street and Pier 1 that the wind was 20 to 25
101 miles an hour from the southwest?

A. Yes, I believe it was that. Of course that was seven years ago, and it is hard to remember exactly the conditions.

Q. Well, it was blowing in gusts, wasn't it, it wasn't just a steady 20 to 25 mile an hour wind?

A. I would say it was gusty, yes.

Q. So that at times the wind would exceed 20 to 25 miles an hour?

A. No, I wouldn't think it would exceed 25 miles an hour at any time.

Q. It has been suggested by one of the witnesses for the United States of America, Captain Hopkins, who was he?

A. He was the chief mate, yes, sir.

Q. It was suggested by him in his deposition—this is page 10, Mr. Fleischer—he was asked:

"Q. Captain, as the GALE approached the slip she was about to enter did she attempt to move straight in or did she approach it at an angle from the north?

A. She approached at an angle from the north, yes, sir.

"Q. Was that a proper approach?

"A. According to the wind and tide I do not think it was.

"Q. What in your opinion based upon your observation would have been the proper approach?

"A. I think the vessel should have been further to the south."

Now, are you in agreement with that?

A. Well, no, I am not. The pilot's intention evidently was to warp the vessel around Pier 1, around the corner of Pier 1.

Q. And in order to do that he would have to make quite a sharp turn to the northerly side of the slip, is that right?

A. Well, not necessarily very sharp, but it would have to be quite sharp, yes.

102 Q. And it was quite sharp on this occasion?

A. It was quite sharp, yes, sir.

Q. If he had gone further to the south, he would in all probability

have been able to keep the vessel farther away from the north side of the pier, in the slip in which they were entering?

Mr. FLEISCHER: I object to that as a situation which we do not know anything about.

The COURT: "If" makes it a bad question anyhow.

Mr. FLEISCHER: The witness is not a tugboat captain.

Mr. LYNCH: I will withdraw it.

Q. Was it possible from your observation and from what you saw that day for the CHRISTOPHER GALE to have entered more to the south than from the middle of the slip?

A. Well, no, sir, there was danger on both sides, that overhang on the end of 52nd Street was one danger and of course the danger of the corner of the dock at Pier 1. But had it worked as the pilot intended it to do, the accident wouldn't have occurred.

The COURT: Well, now, that is a fairly wide slip, isn't it?

The WITNESS: Yes, I should say that it is approximately—this is truly a guess—over 200 feet I should say.

The COURT: Would it have been possible to maneuver so as to enter the slip with clearance both from the overhang on the 52nd Street Pier and the end of Pier 1 itself?

103 The WITNESS: Well, the ship was on an angle, the ship was approaching at an angle there and wasn't very far from the mid section of the slip. The ship, if she had swung out it is quite possible she might have hit the end of that projection. I agree more or less with the pilot, to stay as close to Pier 1 as possible.

Q. Captain, after the bow of the CHRISTOPHER GALE was entering the slip, or a slight distance into the mouth of the slip and it was seen that the ship was falling down or sagging down under the force of the wind and the tide on Pier 1, would it not have been possible at that time to have backed out?

A. That I can't say, sir, because as I say I was at the telegraph and was taking orders from the pilot.

Q. But you have seen it done?

A. I have seen a ship backed out, yes.

Q. When there were circumstances and conditions similar to what existed on this day?

A. I believe that she fell down so rapidly he didn't have an opportunity to do that.

Mr. LYNCH: That is all.

REDIRECT EXAMINATION.

By Mr. FLEISCHER:

Q. Captain, are you able to form an opinion as to the cause of the ship dropping down so rapidly?

A. Apparently not enough power to hold it up there.

Mr. FLEISCHER: That is all, Captain.

104 RECROSS EXAMINATION.

By Mr. LYNCH:

Q. Just one more question, Captain. At various times when you were in port and being docked or undocked the Tug DAUNTLESS #6 had been one of the tugs used in that operation, had it not?

A. I don't believe so, no, sir.

Q. This is the first time you can remember having seen it?

A. As far as I can remember, yes, sir. I could refresh myself by looking back through the log, but I can't remember, and probably I wouldn't have remembered the name of the tug this time if there hadn't been an accident that day.

Q. Will you take your log, and while the next witness is being examined take a look at it and see if you find that you had the #6 with you on any other occasion?

A. Yes.

Mr. FLEISCHER: One more question, at the time that the ship was being undocked at Hoboken did you know the horsepower of either the Tug DAUNTLESS #6 or the DAUNTLESS #9?

The WITNESS: No.

(Witness excused.)

CLARK COTTRELL, called as a witness on behalf of the respondents, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. FLEISCHER:

Q. Captain, will you tell us what your present occupation is?

A. Chief Pilot, New York Naval Shipyard, Brooklyn, New York.

105 Q. What license do you hold

A. I am Master, Bay, Sounds and Rivers, New York lower Bay and Harbor, Staten Island Sound, Hudson River to Cornwall——

Q. In other words all the usual pilot's licenses?

A. Yes, sir.

Q. For any gross tonnage?
A. Any gross tonnage, yes, sir.
Q. How long have you held that license?
A. Since 1914.
Q. How long have you been employed by the New York Naval Shipyard?
A. Twenty-six years.
Q. That is the Brooklyn Navy Yard?
A. Yes.
Q. Commonly referred to as the Brooklyn Navy Yard?
A. Yes, sir.
Q. And you are an employee of the United States of America?
A. Yes, sir.
Q. In taking that employment with the United States you took the usual oath?
A. Yes.
Q. For how many years would you say you have had experience in working around New York Harbor?
A. Thirty-five years.
Q. Has that been mainly with tugboats?
A. Yes, sir.
Q. Will you tell us what your duties are with the New York Naval Shipyard?
A. Piloting ships and directing docking and undocking in the Port of New York.
Q. What types of ships are those?
A. All types of naval ships, battleships, airplane carriers, cruisers, destroyers, tenders.
Q. When you say tenders, are they freight carrying ships?
A. Yes.
Q. Something on the order of a Liberty ship?
A. Yes, sir.
Q. Transports?
A. Yes, sir.
Q. Have you docked many of those ships?
A. Yes, sir.
106 Q. In all parts of the Harbor of New York?
A. Yes, sir, in all naval activities in the Port of New York.
Q. Captain, in the docking and undocking work and shifting work with the Navy, does the Navy employ commercial tugs at times?
A. Yes, they do.
Q. Do they do that under contract?
A. Yes, sir.
Q. Do you direct the tugs?
A. Yes, sir.
Q. In docking and undocking?
A. Yes, sir.

Q. Captain, with your past experience in New York Harbor have you come to know the various tugs in the harbor?

A. I am very familiar with them.

Q. Are you familiar with the provisions of the contract that the Navy has with commercial tug companies with respect to the type of tug to be used for transport work on large vessels?

A. Yes, sir.

Q. What is that provision?

A. Why, they are not supposed to use a vessel of less than 650 horsepower for a unit over 400 feet long.

Q. And that is for transport work?

A. Yes, sir.

Q. That is for docking and undocking of ships and shifting?

A. Yes, sir.

Q. And that is with the use of their engines as well as in other ways?

A. Sir?

Q. Is that with the use of the vessel's engines?

A. Yes, sir.

Q. Captain, based upon your experience in the Harbor of New York will you tell us if you can what percentage there are of tugs under a horsepower of 650 or 700 horsepower?

Mr. LYNCH: I object to that from his experience, he would have to take the blue book and look through it to be able to make a statement on that.

107 The COURT: I will sustain that objection.

Q. Have you been consulted by officers of the Navy Department in connection with the drawing up of a manual for the docking and undocking of vessels?

A. Yes, sir.

Mr. LYNCH: I object to that as being irrelevant and immaterial to this case.

Mr. FLEISCHER: I merely add that as a qualification, that is all.

The COURT: All right.

Q. Captain, in the usual course of docking or undocking vessels, do you give orders to the tugs to take positions?

A. Yes, sir.

Q. When you use commercial tugs, in giving them an order to take up a position do you tell them how to make up their lines?

A. No, sir.

Q. That is left to the tugboat captain, is it not?

A. Yes, sir.

Q. If you told a tugboat to take up a position with a backing and spring line out, how would you expect the line to be made up on the tugboat?

Mr. LYNCH: I object to that.

The COURT: I sustain the objection.

Q. Well, can you tell us the proper way to make up the backing line and the spring line on a tugboat which is to assist in the docking of a vessel so that the tugboat may have a free swing, and yet go full ahead on it?

A. Yes, sir.

108 Q. Will you describe how the lines should lead?

A. The spring line is generally taken to the stem head of the tug, and then secured to the after part of the cavel bits, main cavel bits of the tug. And the back line is secured to the after bitts of the main cavel bitts of the tug.

Q. You are assuming a tug with cavels on her bow?

A. Yes, sir.

Q. And a stem bitt right up at the stem?

A. Yes, sir.

Q. Would you take this piece of paper and a pencil and draw the outline of a tugboat, and place the bitts as you describe them?

(Witness draws.)

Q. Will you label that?

A. Those are the main bitts.

Q. Now, will you draw in the backing line and the spring line?

A. The backing line leads——

Q. As it should be.

A. From the after part of either cavel bitt up to the ship, and the spring line leads around the stem bitt up to the ship.

Q. That comes back to the stem bitt?

A. It comes back and is secured to this line. This line is secured to this bitt (indicating).

Q. When you say the spring line goes around the stem bow bitt or the stem bitt and leads back around the main cavel bitts——

A. Yes, and it can lead to the forward bitts, and be secured which ever way the deck hand wants to make them fast; it can be made fast either way.

Q. But the important thing——

Mr. LYNCH: Don't lead, please.

Q. The backing line then leads from the ship to the after bitt in the cavel bitts?

A. Yes, sir.

109 Mr. FLEISCHER: Will you mark that in evidence, your Honor?

(Marked Respondents' Exhibit H in evidence.)

Q. Now, Captain, if tug lines are made up in the fashion which you have described them on that diagram which is now Respondents' Exhibit H, and they consist of a backing line, and spring line to the ship, if the tug puts her wheel hard right and works her engines full ahead, would she be able to get head on to the side of the ship?

A. Yes, sir.

Q. Without any difficulty?

A. Yes, sir.

Q. Now, Captain, assume that the backing line is the way you drew it on the diagram Exhibit H, but that the spring line leads, not around the stem bitt but around the forward part of the cavel——

A. I do not understand your question.

Q. I say assume that the backing line leads back to the after bitt of the cavel as you described it in your diagram, in other words the same as your diagram is drawn, but that the spring line leads from the ship down to the tug and is made fast on the forward part of the cavel, the forward bitt of the cavel, and doesn't pass around the stem bitt; would that tug under a hard right wheel with her engines full ahead have any difficulty in getting head on to the ship?

A. Yes, she would.

Q. Will you tell us why?

A. For the tugboat working around on a hard right wheel to get head on to the ship, this spring line made fast to the forward part of the cavel bitts, with the spring line that way the tug reaches a certain point, and then that line would become strained, you would get a strain on it, and a burden on it, and the tug would not come around easy unless that line is slackened, weakened.

110 Q. She would be at an angle?

A. Yes, sir.

Q. Would she ever get around to a 90-degree angle?

A. Not unless she slacked those lines, or the lines parted.

Q. If she did not slacken that line or the line did not part, what would happen to the position of the tug alongside the ship?

A. The tug would slide ahead along the side of the ship until she got friction enough by reason of that spring line pulling her in, got friction enough on just the side of the ship to stop her; the line wouldn't let her go all the way around.

Q. If she slackened her line would that permit her bow to slide along the side of the ship?

A. Yes, sir.

Q. And then would she again be at the same angle as she was before?

A. Practically, yes, sir.

Q. So that she would never get all the way around without a strain on the spring line?

A. No, sir.

Q. If she didn't have a strain on the spring line, and she was head on she would slide along the side of the ship?

A. Yes, sir.

Q. In other words, the pressure as I understand it, is that the spring line is to hold the tug back from sliding along the ship?

A. Yes, sir.

Q. And under those circumstances she never could get into one spot and get head on to the side of the ship?

A. No, sir.

Q. Is that correct?

A. That is right, sir.

Q. Do you know how many tugs there are around the harbor here that are under five or six hundred horsepower in use for transport work?

Q. Not many.

Q. In other words the majority are of greater horsepower?

111 Mr. LYNCH: I object to that, he said not many.

The COURT: Sustained.

Q. Would you tell us some of the considerations that you bear in mind before you set out on a shifting operation, which would include undocking and docking of a vessel of approximately the size of a Liberty ship?

A. Take the ship into consideration, and whether she was going to be docked or undocked, and the tidal conditions and weather conditions.

Q. Would you consider how many tugs you were going to use?

A. Yes, sir.

Q. On what would you base that consideration?

A. Well, weather conditions, where the ship was going to be docked, and weather conditions.

Q. Would the power of the tugs play a part?

A. Yes, sir.

Q. If you had a tug of high horsepower, would you use less or——

A. Use less tugs.

Q. Than if you had tugs of a low horsepower——

A. You would have to use more tugs.

Q. Captain, are you familiar with Pier 1, Bush Terminal and 52nd Street Pier in Brooklyn?

A. Yes.

Q. And the waters around there?

A. Yes, sir.

Q. Given a situation such as we have in this case where a Liberty ship is to be docked in the morning with a southwest wind of approximately 20 or 25 miles an hour, one tug on the vessel's port bow and one tug on the vessel's port quarter with the intention of warping the ship around the south corner of Pier 1, Bush and making use of the steamer's engines, and with the ship turning into

the slip somewhere around mid slip, and just after making the turn and exposing her starboard side to the wind she then
112 begins to drift down towards Pier 1 at her bow, could you form an opinion as to the cause of that ship drifting at that point?

A. Why, yes.

Q. What would your opinion be as to the cause of that ship drifting?

A. With a southwest wind, the ship broadside to it naturally she would have to drift down towards Pier 1.

Q. If she had a tugboat on the port bow pushing full ahead and a tugboat on the port quarter pushing full ahead, with those conditions, having the tugboats pushing full ahead and having her still drifting down, what would be the cause of her drifting down?

Mr. LYNCH: If your Honor please, I think that is purely speculative and not within the knowledge of the witness, he not having been there.

The COURT: Well, he is asked to assume those conditions.

A. There wouldn't be power enough to hold the bow of the ship up when she was broadside to the wind of 20 or 25 knots.

Q. And a food tide of about a knot?

A. About one knot, yes.

Q. If you knew that the tug at the port bow had a horsepower of 387, would that strengthen your opinion or weaken your opinion?

A. Personally I would never have went into the slip under those conditions.

Q. Would that strengthen or weaken your opinion?

A. I do not get you.

Q. If you knew the tug at the bow had a horsepower of
113 387, and the conditions were as I stated in my previous question, would that strengthen your opinion or weaken your opinion?

A. Strengthen it.

Q. If you had adequate power on the port bow, under those conditions could you hold a Liberty ship up under a 20 to 25 mile an hour wind?

A. Yes, sir.

Mr. LYNCH: I object to that.

The COURT: Certainly if you assume——

Mr. FLEISCHER: I am assuming the same conditions.

The COURT: But you are not, you are using the word "adequate" which assumes a whole lot.

Mr. FLEISCHER: I meant more power, would that make any difference? Would that make any difference if they had more power at that point?

The COURT: I think you had better reframe your question.

Q. If there was more power at the port bow under the same conditions, would you expect that a Liberty ship could be held up under a 20 to 25 mile an hour southwest wind?

A. Yes, sir.

Mr. FLEISCHER: Your witness.

CROSS EXAMINATION.

By Mr. LYNCH:

Q. Captain, I understood you to testify that if the lines were made fast, that is the backing line and the spring line were made fast from the bow of the tug as you say they should be made fast, that the tug would have no difficulty in maintaining her position under a hard right wheel head on to the ship?

114 A. That is if the spring line is made fast to the stem head of the tugboat.

Q. Wouldn't the forward motion of the ship have something to do with that? In other words wouldn't it swing around so it would be angling toward the ship instead of head on?

A. Yes, but at the same time with the line made fast to the stem head, the stem bitt he would have more opportunity to work around to head on. If the line is made fast to the cavel bitts the pivoting point would be at the cavel bitts, and not at the stem head, and the tug would have a tendency to push the ship ahead, because he couldn't work around to right angles to the ship.

Q. Even if she had her backing line from the stem head bitt, there would be a tendency, would there not, for her to swing around toward an angle to the ship because of the forward motion of the ship's engines?

A. Are you talking about a backing line or spring line?

Q. The spring line.

A. If the line is made fast at the stem, that becomes the tug's pivoting point right there, and she has a good opportunity to work around head on to the ship with a hard right wheel, more opportunity than if the spring line was made fast on the cavel bitts, because the difference in the pivoting point would be maybe three or four feet from the stem bitt and the cavel bitts.

Q. But will you answer my question, please: Even if it was made fast on the forward bitt, nevertheless the forward motion made by the ship's engines would tend to make her swing around at an angle to the ship?

A. That is according to how much forward motion the ship has had.

Q. But it would have a tendency to do it, no matter what the forward motion is?

115 A. It would be more difficult to work her under those conditions, as there would be more forward pressure.

Q. I believe you answered one of Mr. Fleischer's questions to the effect that there are not many tugs of 450 horsepower or less in use around New York Harbor.

A. That is doing transport work.

Q. And that was given as the condition at the present time, was it not?

A. Yes, sir.

Q. And for the past few years?

A. Yes, sir.

Q. But back in 1945 and 1946 there were a great many tugs of less than 450 horsepower in use around the harbor for transport work?

A. Well, I wouldn't say less because we always had tugs from 1918 on with the Shipping Board boats that was 600 horsepower.

Q. Let us confine ourselves then to the commercial tugs around New York; you observed there were a great many of them less than 450 horsepower in use in those days, did you not?

A. Not so many, no.

Q. But there were a good many?

A. There were a few doing commercial work or transport work.

Q. When you go aboard to pilot a ship and assign stations to your various tugs that are going to assist you, do you inspect the manner in which the lines are put out to the ship?

A. What is that?

Q. Do you inspect the lines that are put out from the tug to the ship?

A. No, sir, I do not.

Q. How then do you know how they make fast the spring line?

A. Well, a tug master that is doing commercial work and transport work, that is the usual procedure.

Q. But you do not know of your own knowledge that they do it?

A. Unless I look.

Q. Unless you look, and you have already said you do not

116 look.

A. At times I look, sometimes I do not look, I expect the tug master to have those qualifications.

Mr. LYNCH: That is all.

REDIRECT EXAMINATION.

By Mr. FLEISCHER:

Q. Just one question. With the tug's lines around the stem bitt of the tug over to the ship, does the power of the tug still play an important part, beside the lines?

A. Oh, yes.

Q. In other words if the lines are made up properly as you have described, with the spring line on the bow bitt of the tug, does the tug still need considerable power to turn her around to get head on?

A. Yes, sir.

Q. Does that play an important part, the power of the tug?

A. Yes, sir.

Mr. FLEISCHER: Now, your Honor, the other testimony that the United States and the Luckenbach will offer in this case is a deposition taken of Captain Thomas Hopkins who was the chief mate aboard the CHRISTOPHER GALE, and was on the bow during the shifting operation. And we offer another deposition—I might say Captain Hopkins' deposition was taken December 12, 1952 at Savannah, Georgia.

We offer also another deposition, the deposition of William Michaelson who was the acting second mate on the stern of the CHRISTOPHER GALE at the time of the shifting operation, and his deposition, your Honor, was taken in New York on January 22, 1953, mainly because we were not able, or Mr. Lynch was not ready to go to trial at that time, and Mr. Michaelson was in port, and
117 we had to take his testimony at that time because he was going back to sea.

I offer those two as Government exhibits.

Mr. LYNCH: Are you offering the whole deposition, including the cross as well as the direct?

Mr. FLEISCHER: Oh yes, I would offer the whole deposition.

Mr. LYNCH: Yes.

(Captain Hopkins' deposition marked Respondents' Exhibit I in evidence.)

(William Michaelson's deposition marked Respondents' Exhibit J in evidence.)

Mr. FLEISCHER: Do you wish to press any of the objections in those depositions?

Mr. LYNCH: Oh, yes, I will——

Mr. FLEISCHER: This would be the time to do it.

Mr. LYNCH: I want to have them before the Court.

The COURT: What is next, Mr. Fleischer?

Mr. FLEISCHER: That is all, your Honor.

The COURT: You rest?

Mr. FLEISCHER: We rest.

Mr. LYNCH: If your Honor please, the respondent asked us to produce the towing sheets or daily work sheets of Dauntless Tug #6. We were able to get them for the year 1945, and up until April, the

date of this accident of 1946. And they show that during 1945 the ships handled by the #6 were 113, and the barges 251; and in 1946 49 ships and 112 barges.

118 Now, we would like to inquire from the captain if he has inspected his log.

HAROLD L. POTTER, resumed.

DIRECT EXAMINATION.

By Mr. FLEISCHER:

Q. Captain, Mr. Lynch asked you to examine the logbook and tell him if between the dates, what were the dates?

A. March 8th.

Q. And when, April 6th?

A. March 8, 1946.—that is 1945, March 8, 1945, to the date of this shifting where she was damaged, April 6, 1946.

Q. What was the result of your search?

A. She hadn't helped us, the ship.

Q. The #6 had not helped the ship CHRISTOPHER GALE during that period?

A. No, only that one time.

Mr. LYNCH: Captain, would you also look through——

Q. Captain, I have been looking at the towing sheet of the Dauntless Tug #6 for March 7, 1946 which shows that she handled the CHRISTOPHER GALE from Pier 20 to Pier C 23rd Street from 4:30 P. M. to 6:30 P. M.

Will you again look at your log for the date of March 7th?

A. I have not found March 7th.

Q. I have it here and I am going to show it to you, and I want you to tell Mr. Lynch about that shifting.

A. Yes, it shows the Dauntless #6, Dauntless #9 and Dauntless #5.

Q. Were all working on the ship that day?

A. Yes, sir.

Q. Was she loaded?

A. No.

119 The COURT: It was the 6 you wanted?

Mr. FLEISCHER. He said that the 6 and the 9 and the 5 handled the ship on that day.

The COURT: Did you say #6?

The WITNESS: Yes, sir, I said 6, that was on the 7th, March 7.

CROSS-EXAMINATION.

By Mr. LYNCH:

Q. In other words there were three tugs handling the ship that day?

A. Yes, it shows three.

Q. That is the DAUNTLESS 6, the DAUNTLESS #9 and the DAUNTLESS #5?

A. Yes, sir.

Q. That is the same ship, the CHRISTOPHER GALE, and she was light?

A. Yes, sir.

Q. And you take that information from the vessel's logbook?

A. From the vessel's logbook, yes, sir.

COLLOQUY

Mr. LYNCH: That is all.

The COURT: Is there anything else?

Mr. LYNCH: No.

The COURT: Do both sides rest?

Mr. FLEISCHER: I would like to ask Mr. Lynch if that April 6, 1946 towing sheet should not go in evidence, I think that might go in evidence, the towing sheet for the DAUNTLESS #6.

Mr. LYNCH: No objection.

(Marked Libelants' Exhibit 4 in evidence.)

Mr. FLEISCHER: I imagine you want to substitute a photostat for that exhibit, Libelants' Exhibit 4.

Mr. LYNCH: Yes.

120 Mr. FLEISCHER: With that, your Honor, we rest.

The COURT: Both sides rest. I shall want the record in this case, and I want findings of fact and conclusions of law as well as the argument in your briefs.

All papers to be submitted to the Court by May 4, 1953.

121 LIBELLANT'S EXHIBITS 1, 2, 3, & 4

(Omitted pursuant to stipulation)

122 RESPONDENTS' EXHIBITS A, B, C, D, E, F, G and H

(Omitted pursuant to stipulation)

123 RESPONDENTS' EXHIBIT I

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. A.18567

CHRIS NIELSON, et als, Co-Partners trading under the firm name and style of DAUNTLESS TOWING LINE, LIBELLANT

—versus—

UNITED STATES OF AMERICA and LUCKENBACH STEAMSHIP COMPANY, INCORPORATED, RESPONDENT

APPEARANCES:

Representing Libellant:

Lawton & Cunningham
Savannah, Georgia
By: Julian C. Sipple Esq.

Representing Respondent:

Donald H. Fraser, Esq.
Assistant U. S. Attorney
Savannah, Georgia

This is the deposition of Captain Thomas Hopkins, witness for the respondent in the above styled case pending in United
124 States District Court for the Eastern District of New York, by agreement of the parties taken on the 12th day of December, 1952, beginning at approximately 10:00 A. M., in Room 317, Post Office Building, Savannah, Georgia.

It is stipulated between the parties that the notice of the taking of this testimony has been waived and that the deposition is taken by consent.

Further stipulated that the testimony of Captain Hopkins shall be taken by Mrs. Juanita C. Beasley, of Savannah, Georgia, a commercial notary public under the laws of Georgia.

Further stipulated that the reading, examination and signing of the transcript by the witness, and filing and certification of the transcript by Mrs. Beasley, before whom this deposition is taken, are all waived.

It is further stipulated that all objections, except as to the form of the questions, be reserved until the trial of this case.

Captain Thomas Hopkins, being first duly sworn, deposes as follows:

DIRECT EXAMINATION.

By Mr. FRASER:

Q. What is your full name?
A. Thomas S. Hopkins
Q. Your address?
A. Crescent, Georgia.
Q. What has been your experience, Captain Hopkins, as a seaman?
A. As a seaman? Well, I started going to sea in 1910.
125 Q. When did you receive your commission?
A. In 1919, as a Third Mate.
Q. Were you on the SS CHRISTOPHER GALE on April 6, 1946?
A. Yes, sir.
Q. In what capacity?
A. As Chief Mate.
Q. What was the complement of the ship on that date?
A. You mean as to the number of crew?
Q. Yes.
A. Well, they sent us down ten men from the Seaboard Marine Service.
Q. What was the movement of the vessel that morning of April 6, 1946?
A. We were leaving the Bethlehem Shipyard there, coming back to Hoboken to tie up.
Q. I will ask you if the ship was being shifted from Pier No. 2 at Fletcher's, Hoboken, New Jersey, to the North side of 52nd Street Pier, Brooklyn, New York?
A. Yes, sir. I think that was the number.
Q. Did you engage the services of any towing company to assist in that movement or to shift the vessel to Brooklyn?
A. The Luckenbach Company engaged them.
Q. Was the ship's complement adequate for the shifting operation that you were undertaking on that date?
A. I think so, yes, sir.
Q. I will ask you what this is, Captain Hopkins.
126 (Mr. Fraser hands paper to the witness)
Is that a copy of a page from the ship's log?
A. Yes, sir.
Q. Is this your signature at the bottom?
A. Yes, sir.

Mr. FRASER: I would like to have this identified for the record.

Mr. SIPPLE: I have no objection.

(A photostatic copy of a page from the log of the SS CHRISTOPHER GALE, dated April 6, 1946, is marked for identification as Respondent's Exhibit No. 1, and made a part of this record.)

Q. Captain Hopkins, was the steering gear, telegraph apparatus and whistle of the ship checked before you started out on the date in question?

A. Yes, sir, and found in good order.

Q. Found in good order. Captain, what was the weather condition on that morning during the shifting operation?

A. There was a strong northwesterly wind blowing and a flood tide.

Q. What would you say was the force of the wind during the shifting operation?

A. About 4 to 5.

Q. Referring to the log, Captain Hopkins, was the ship's draft light on that operation?

A. Yes, sir.

127 Q. What was the position during this docking operation of the DAUNTLESS #6 tug boat, with reference to the vessel?

A. She was on the port side made fast alongside hatches 4 and 5.

Q. Was the DAUNTLESS #6 able to hold the vessel's bow up in order to warp it into the slip?

A. No, sir. She couldn't hold the bow up against the wind.

Q. What was the position now of DAUNTLESS TUG #9?

A. She was on the bow opposite hatches 1 and 2 on the port side.

Q. Who was the officer or pilot on the bridge of the CHRISTOPHER GALE during this operation?

A. Let's see. It was Robert Nielson.

Q. Did you get any orders from Officer Nielson from the bridge of the CHRISTOPHER on that date during this operation?

A. I received orders from the Pilot to let go the starboard anchor.

Q. Did you do so?

A. Yes, sir, immediately.

Q. Did the vessel CHRISTOPHER GALE continue to drift after you let go the anchor?

A. Yes, sir.

Q. And what happened then, Captain Hopkins?

A. The ship kept sagging down and the tug boat #6 alongside came up against Pier No. 1, Bush Terminal.

128 Q. Did you hear any orders given from Mr. Nielson, pilot of the CHRISTOPHER GALE, to TUG DAUNTLESS #6 during this operation?

A. No, sir. They work it by whistles you know. I didn't hear any orders.

Q. Were you in position to hear any orders, if they had been given?

A. Yes, sir. I could have heard them.

Q. Did the DAUNTLESSS #6 contact the pier?

A. Yes, sir.

Q. Was it, or not, a squeeze of the tug boat DAUNTLESS #6?

A. Yes, sir. She was in between.

Q. Did you, or not, hear DAUNTLESS #6 blow any whistle signals prior to the contact?

A. No, sir.

Q. How was the CHRISTOPHER GALE finally docked?

A. The tug boat had let a line over to the far side of the slip. We warped ahead and ran the lines across to the other pier and the tug boat got back and pushed the stern against the dock.

Q. You finally docked, then, with the aid of a tug?

A. And our winches.

Q. Your mooring winches?

A. Yes, sir.

Q. Captain Hopkins, would you say whether or not this collision was the result of any fault of the CHRISTOPHER GALE's complement?

A. No, sir. I would not say that it was.

129 Q. Would you say that the collision resulted from any fault of the orders given by the pilot?

Objection by Mr. SIPPLE:

I would like to enter an objection to that question. It is a leading question, asking a conclusion of the witness.

Q. Did the CHRISTOPHER GALE rely on the judgment of the tug boat pilot as to the adequacy of the power furnished in this shifting operation of the vessel?

A. Yes, sir.

Q. Captain Hopkins, are you willing to waive the requirement that you examine and read the transcript of the testimony after it has been transcribed and the signing of it by you?

A. Yes, sir. I am willing to waive it.

Q. Captain Hopkins, are you in position to testify that the anchor gear and all other equipment on the vessel CHRISTOPHER GALE which you had knowledge of was in good operating condition on that day?

A. It was.

Q. Captain Hopkins, what effort did the DAUNTLESS 6 make to extricate itself from this position there of danger?

A. None.

Q. Could it have avoided this collision after the danger arose, by any means that you know?

Objection by Mr. SIPPLE:

I object to the question as calling for a conclusion of the witness.

130 Q. Did the DAUNTLESS 6 make any effort to cut its line? Did it make any effort to move out of its place and away from Pier No. 1?

A. No, sir.

Q. Was the tide setting against the CHRISTOPHER GALE when she attempted to dock?

A. Yes, sir. When we started swinging, the tide was right against her side.

Mr. FRASER: That is all.

CROSS EXAMINATION.

By Mr. SIPPLE:

Q. Captain Hopkins, on this occasion when the CHRISTOPHER GALE was being shifted from Hoboken to Brooklyn, did you occupy a position at the bow of the vessel?

A. Yes, sir.

Q. And that was the customary position of a chief mate under those circumstances?

A. Yes, sir.

Q. Captain Hopkins, what other officers were on board the CHRISTOPHER GALE in addition to yourself?

A. The engineers. They were on board because they had to maintain and run the engines.

Q. Were there other officers?

A. I am pretty sure there were not. I couldn't swear to it.

Q. Captain Hopkins, did I understand you to say that the tug DAUNTLESS #6 was on the port side of the CHRISTOPHER GALE, about opposite hatches 4 and 5?

A. Yes, sir.

131 Q. And did you also testify that #9 was at the port bow, about opposite hatches 1 and 2?

A. Yes, sir.

Q. Did you think that you could be mistaken about that and that it was #6 at the bow, rather than #9?

A. I don't remember. Let's see. She was right off frame 44. That would throw it the opposite, I believe.

Q. You have taken the information you have just given from the photostatic copy of a page from the log that was introduced by the respondent as Exhibit No. 1?

A. Yes, sir.

Q. Am I to understand, then, your testimony is that the #6

was at the bow of the GALE rather than on her port quarter as you earlier testified?

A. I thought it was the other way. It has been so blooming long ago I have forgotten. I know she was opposite that frame No. 44.

Q. Then, as I understand it, according to your recollection the #6 could have been at the bow. You are not certain, however. Is that right?

A. I am pretty sure she was at the aft end.

Q. What was the approximate position of the vessel in relation to the slip that you were about to enter at the time you let the starboard anchor go?

A. She was opposite the entrance to the slip.

Upon reflection, I believe now that tug #6 was at the port bow of the GALE and that #9 was made fast to our port quarter.

132 Q. And it was tug #6 that was squeezed between the ship and the pier, was it not?

A. Yes, sir.

Q. On this day the CHRISTOPHER GALE was using her own power in addition to the assistance from the tugs, was she not?

A. Yes, sir.

Q. Was the docking pilot, Mr. Nielson, directing the entire handling of the vessels from Hoboken over to Brooklyn?

A. Yes, sir.

Q. The two tugs were subject to his orders?

A. Yes, sir.

Q. Captain, as the GALE approached the slip she was to enter, did she attempt to move straight in or did she approach at an angle from the North?

A. She approached at an angle from the North. Yes, sir.

Q. Was that a proper approach?

A. According to the wind and the tide I don't think it was.

Q. What in your opinion, based on your observation, would have been the proper approach?

A. I think the vessel should have been further to the South.

OBJECTION INTERPOSED

By Mr. FRASER:

We object to the last two questions and the answers given as soliciting and giving a conclusion and opinion of the witness.

133 CROSS EXAMINATION BY MR. SIPPLE (CONTINUED):

Q. When you dropped your starboard anchor did it take hold immediately?

A. Yes, sir.

Q. You stated, Captain, that you were at the bow of the vessel?

A. Yes, sir.

Q. Then were you in position to observe the movements of the tug #6?

A. Yes, sir.

Q. Do your recall what lines she, #6, had out to the GALE?

A. She had one bow line, as I remember.

Q. Did she have a spring line running aft?

A. That I don't remember. We very seldom put that out.

Q. Such lines as the #6 did have out were from her bow bitts, weren't they?

A. Yes, sir.

Q. Will you describe the events that took place immediately after the CHRISTOPHER GALE began to head in the direction of the slip?

A. The events that took place just prior to the time the #6 was squeezed against the corner of Pier No. 1?

Q. Just tell us what you recall as to what happened?

A. Well, we dropped the anchor and were so close to the pier the anchor chains didn't have time to fetch up and then when we did fetch up we were practically against the pier.

134 Q. Were you watching the #6 during the few minutes that preceded her being squeezed against the pier?

A. Yes, I could see her all the time.

Q. During this time was the GALE sagging over toward the corner of Pier No. 1?

A. Yes, sir. Falling in all the time.

Q. Was the wind and tide against her starboard side?

A. Yes, sir.

Q. Captain, did you observe that the spring line from #6 was slackened off just before she was squeezed against the pier?

A. No, sir.

Q. And did I understand you to say on direct examination that you heard no orders given by the docking pilot to the tug #6 just prior to the accident?

A. No, sir, I didn't hear a thing.

Q. Were you aware of the fact that #6 was in difficulty and was going to be squeezed between the pier and the GALE?

A. Yes, sir.

Q. Captain, am I to understand that you have no definite recollection as to the lines that were out from #6?

A. Since I think of it now she did have a spring line and a bow line—just the two lines.

Q. And did you not observe that the #6 slackened off on one of her lines just before the accident?

A. No, sir, I didn't see that.

135 Q. Can you say with certainty that she did not do it?

A. No, sir. I would have had to go way over to the side of the ship and look down.

Q. In other words, you were not in position to see just what was going on in regard to the lines.

A. No, sir.

Q. And you stated that the two tugs all during this operation just before the squeezing of #6 were operating under the orders of the docking pilot who was on board the GALE?

A. Yes, sir.

Q. Had the vessel attempted to enter the slip from a point further South would it have had more room for navigation?

A. Yes, sir.

Q. And you state that the wind force was about 4 to 5?

A. Yes, sir.

REDIRECT EXAMINATION.

By Mr. FRASER:

Q. Captain Hopkins, as the bow of your vessel started into the slip was the tug boat #9 able to hold up the stern, or did it hold it up?

A. No, sir. It didn't hold up.

Q. I will ask you what was the force of the wind at the time you engaged the services of the Dauntless Towing Line to shift this vessel to Brooklyn.

A. It was blowing about the same. The same thing as we had at the time of the docking.

136 Q. Did the full force of the wind strike your vessel as it made its turn to go into the slip?

A. Yes, sir.

Q. From what direction did it strike?

A. It struck on the starboard side.

Q. The force of the wind then was not as great coming down the channel as it was when you made the turn?

A. It was the same thing. But we were heading into it.

Q. Coming down the river you were heading into it?

A. No, it was from behind us, kind of on our starboard quarter.

Q. When you became aware that the tug #6 would likely be squeezed, did the tug make any attempt to cut her line and move out of danger?

A. Not that I know of.

Q. After you became aware of the danger of this tug boat, did it have time to move out and protect itself from this danger?

A. That is a hard question to answer. I don't really know if she had time or not. We were so close to the dock.

Q. Under the circumstances as they existed there, Captain Hopkins, if the Tug Line had had sufficient tugs or tugging power there, could the vessel have been held up against the wind and tide?

A. Yes, sir. If they had had more tugs, they could have held it up against the tide and wind

Q. And they only had two tugs?

A. That is the customary number of tugs. They used two tugs.

137 RECROSS EXAMINATION.

By Mr. SIPPLE:

Q. Captain, as I understand it, the fact of the matter is you were not in such position as would enable you to say definitely whether the #6 did or did not make any effort to avoid the accident.

A. When the ship started falling in and I saw she was going to get mashed I walked over to the side and watched it.

Q. By that time it was imminent?

A. Yes, sir.

REDIRECT EXAMINATION.

By Mr. FRASER:

Q. After the danger to the tug #6 became apparent from the swinging of the vessel, was there sufficient time for tug #6 to have cut her lines and moved out of her position?

A. That would be hard to answer. If the lines had been cut, I think she could have moved out in time.

RECROSS EXAMINATION.

By Mr. SIPPLE:

Q. You heard no order from the docking pilot to #6 to move out?

A. No, sir.

Q. And did I understand you to say that the GALE was sagging rapidly over toward the corner of Pier No. 1?

A. Yes, sir.

Mr. SIPPLE: That is all.

138

GEORGIA)
CHATHAM COUNTY)

I certify that the foregoing deposition was taken before me, as stated in the caption, and that the questions and answers were reduced to writing by me.

I further certify that I am not interested in the outcome of said case and am neither of kin to nor counsel for either of the parties.

(Signed) JUANITA C. BEASLEY
Notary Public,
Chatham County, Georgia

Notary Public, Chatham County, Ga.

My Commission Expires Jan. 11, 1955
(Seal)

139 Respondent's Exhibit J

United States District Court for the Eastern District of New York

No. A. 18567

CHRIS NIELSON, *et al.*, Co-partners trading under the firm name and style of DAUNTLESS TOWING LINE,

Libellant,

—VERSUS—

UNITED STATES OF AMERICA and LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondents.

Deposition of William Michelson, taken by respondents, before Edward Salter, Notary Public of the State of New York, at the United States Courthouse, Foley Square, New York City, New York, at 3:30 P.M. on January 22, 1953, pursuant to agreement between the parties.

Appearances:

MESSRS. PYNE, LYNCH & SMITH,
Proctors for Libellant,
116 John Street, New York, N. Y.,
By: WARNER PYNE, ESQ.,
Of Counsel.

FRANK J. PARKER, ESQ.,
United States Attorney,
Proctor for Respondents,
By: GILBERT S. FLEISCHER, ESQ.,
Of Counsel.

140 IT IS HEREBY STIPULATED by and between the proctors for the parties hereto that the signing, sealing, certification and filing of the within deposition be, and the same are, hereby waived.

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to the form of the question, are reserved to the time of the trial.

IT IS FURTHER STIPULATED AND AGREED that the notice of the taking of this deposition has been waived, and the deposition is being taken by consent.

WILLIAM MICHELSON, being duly sworn by the Notary Public, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. FLEISCHER:

Q. Captain, will you tell us what license you hold?
A. Master's license and pilotage, first class pilot.
Q. Will you speak up a little, please? I can't hear you.
A. Yes. I should say unlimited, oceans unlimited, ocean master and pilotage, including New York Bay and Harbor.
Q. How long have you been going to sea, Captain?
A. 1910.
Q. How long have you had your master's papers?
A. 1928.
Q. Since 1928?
A. Since 1928, yes.
141 Q. How long have you had your pilot's papers?
A. New York Bay and Harbor, I got in 1926. First class pilot, 1926—was it 1926? Yes, 1926.
Q. By whom are you now employed, Captain?
A. Gulf Oil Corporation.
Q. In what capacity?
A. Chief mate now.
Q. Where is your vessel now?
A. In dry dock shipyard.
Q. Do you plan to go to sea, Captain?
A. Yes.
Q. When?
A. Saturday.
Q. Saturday, January 24th, of this year?
A. Yes.
Q. Were you night mate and acting second mate aboard the S.S. CHRISTOPHER GALE on April 6, 1946?
A. Yes, sir, I was.
Q. Was that vessel shifted from Hoboken to the 52nd Street pier, Brooklyn, on that day?
A. Yes, sir, from Hoboken shipyard, yes, sir.
Q. And you were aboard the vessel at the time?

A. Yes.

Q. Will you tell us whether the vessel was assisted by tugs, and, if so, how many tugs?

A. Yes, sir, by DAUNTLESS #6 and DAUNTLESS #9.

142 Q. Did those tugs aid the vessel in undocking?

A. Undocking and docking. I am not sure whether there was other tugs on undocking, but that is the ones that aid us on docking, the #6 and #9, 52nd Street pier.

Q. Do you recall what the weather conditions were on the morning of April 6, 1946?

A. Yes, sir, I recall.

Q. What were they?

A. Partly cloudy, fair weather, wind from moderate to fresh and southwesterly.

Q. About what force was the wind?

A. From about 4 to 6—about—in gusts.

Q. Do you recall approximately what time the ship was undocked?

A. From Hoboken?

Q. From Hoboken.

A. Shortly after 8. About 8 o'clock.

Q. A.M.?

A. A.M.

Q. Where were you stationed at the time, Captain?

A. I was acting second mate. I was stationed aft, to let go of the lines, handle tugs' lines, see that it was done.

Q. Did you have any men with you?

A. Yes, five or six men, regular crew.

Q. Can you tell us who was up on the bridge?

A. The tug boat captain and the ship's captain and the pilot —that is, at the time of docking, or when?

143 Q. At the time you were undocking.

A. Undocking, the same thing, the tug boat captain, the captain, the man at the wheel.

Q. Before, when you said the pilot you mean the tug boat captain who was acting as pilot?

A. If I recall, there was a pilot that took us from pier to pier —you know, from Hoboken to the 52nd Street pier. I am not so sure about that, now.

Q. Do you know whether he came from the tugs?

A. I know that when he goes—the man that did dock us at 52nd Street, he came from the tug.

Q. And now, will you describe for us the vessel's approach to the 52nd Street pier in Brooklyn?

A. Well, she approach the usual manner.

Q. Were you coming down the Bay Ridge Channel toward 52nd Street pier?

A. Well, we were—if I remember right, now, we were going down Bay Ridge Channel, yes, heading into the wind; and then, when we got off 52nd Street, we shaped in to go into the pier.

Q. Where were you at the time, Captain?

A. Back aft.

Q. Did the ship start to turn into the slip?

A. Yes, she started shaping the slip.

Q. What happened after that, Captain?

A. Well, shortly after we start shape into the slip, I hear the anchor let go, let go our anchor.

Q. Your heard an anchor let go?

A. Yes, our anchor.

144 Q. Do you know which one it was?

A. I don't know. I can't say, but I hear a noise.

Q. What did you do then?

A. Then I start observe things along the port side, because, naturally, letting go anchor, I saw we were getting into trouble, you know—no good shape.

Q. Were there any tugs alongside the vessel at the time?

A. Yes, sir, #9.

Q. Will you tell us where the tugs were?

A. The one back aft was #9. She was line our port quarter, holding up the stern.

Q. Was there any forward tug?

A. Yes, there was a forward tug.

Q. Where was she located?

A. Well, after, as I say, when I heard the anchor let go, I start observe alongside the portside, and she was port—midships on the portside, which was the #6.

Q. The DAUNTLESS #6?

A. Yes.

Q. What position was she in, in relation to the portside of the ship?

A. Where I could see from aft, she was about 25 or 30 degree angle, being away from it, being parallel to the ship. She was something like this (indicating with hands).

Q. At a 25 degree angle?

A. Yes, from being parallel, I mean, from being alongside, as we call it.

145 Q. And about how far was the portside of the CHRISTOPHER GALE from the pier to her port?

A. Well, pretty good distance. About 150 feet—140, 150 feet. Thereabouts.

Q. What pier?

A. Pier One, Bush Dock, that we were off.

Q. What else did you observe, Captain?

A. Well, what I observed then is that we were drifting pretty fast toward Pier One, Bush Dock, and the tugboat was standing in danger, where I could see from there down, that she was too close to midships, and she was going to be there about where the vessel was going to contact Pier One, you know, if the anchor didn't hold or the tugboat didn't hold.

Q. When you first observed the tug DAUNTLESS #6 standing in danger, did you notice whether she did anything to move out of that position?

A. Well, of course, from where I was, I couldn't tell—so close. I actually didn't see anything, I mean, outstanding, or anything.

Q. Did you see the tug move?

A. No, sir, not from where I was. Of course, she could move one way or the other.

Q. Did she appear to stay in the same place?

A. For what I could see from aft, yes, sir.

Mr. PYNE: I object to that question as leading.

Q. Did you notice whether the tug had any lines to the ship?

146 A. Well, I distinctly don't remember that. I couldn't —it seems that I seen bow line up the ship's side, but being aft, I couldn't say definitely that it was or not. I don't know.

Q. When you first were aware of the DAUNTLESS #6 standing in danger, Captain, could she have done anything to protect herself and get out of danger?

A. You mean—

Mr. PYNE: I object to that as leading and also there are other objections which are reserved for the trial.

Mr. FLEISCHER: Will you read the question, please?

(The question was read by the reporter.)

A. Well, yes—wait a minute, wait a minute. Yes, she could get out of the way, yes, sir, or go astern, yes—I don't know. I mean, I was aft.

Q. From your position at the time that you heard the anchor drop from the GALE, did it look to you, Captain, as though the DAUNTLESS #6 could do anything to get out of the way?

A. Yes, it did.

Mr. PYNE: I object to that also as leading.

The WITNESS: Yes, yes.

Q. What could she have done, Captain?

A. Well, she could have gone ahead, letting lines go, if she had any lines onto the ship, and go ahead, get out of the way.

147 Q. Did you see her do that?

A. No, sir, I didn't see anything, you know, what she made.

Q. As the ship was sagging down toward Pier One, did you hear any signals blown by the DAUNTLESS #6?

A. Not that I have noticed, no, sir.

Q. Did you, at that same time, hear the pilot issue any orders to the DAUNTLESS #6?

A. There were some orders being called from the bridge, but I didn't hear what they were, the orders. I mean, there was some shouting, in other words, or yelling, in other words.

Q. Could you tell who was doing the shouting?

A. Not exactly, no, sir.

Q. Do you know whether it was the pilot or the master?

A. Well, that, I didn't notice.

Q. What happened after what you just told us, Captain?

A. That what I observed and when we were drifting toward Pier One, Bush Dock.

Q. Will you continue? What happened after that?

A. Then it happened that we kept on drifting several minutes, and we come in contact with Pier One and the tugboat between the ship and the pier.

Q. Where was the DAUNTLESS #9 at that time?

A. On the stern, pushing.

Q. Was she pushing?

A. Yes, she was up stern, pushing.

148 Q. And was the stern held up?

A. Well, thereabout, yes, sir, more or less the bow—that is, the fore part of the ship, you know, that more or less sagged down on the pier, and the stern was pretty well held, you know, what I could see, apparently.

Q. Could you tell us what part of the portside of the tug was against the Pier One?

A. Well, no, not exactly, no sir—well, the portside of the tug yes, sir. But what part—well, yes, sir, the portside, yes, sir, the portside of the tug.

Q. Did you notice anything else at the time of contact?

A. Why, just after the contact, noticed some steam coming out of the DAUNTLESS #6, out of the skylight, and what not.

Q. What happened after that, Captain?

A. Well, we were against the pier, and the DAUNTLESS #9 held the stern off, or she got clear of it and got to the end of the pier, and we got against Pier One and we laid there until we got some bow lines out, and the DAUNTLESS left us there, and we got lines out, and she throw a line against Pier One—I mean 52nd Street

pier—bow line, and we heaved with it, and with the help of the DAUNTLESS helping—

Q. Which DAUNTLESS?

A. DAUNTLESS #9.

Q. #9?

A. Yes, #9. We got alongside 52nd Street pier, with help our line and DAUNTLESS #9.

Q. And you got into your berth?

A. Yes, the berth, 52nd Street pier.

149 Q. Which side?

A. North side of the pier. Starboard—our starboard side, to, ship's starboard side.

Q. Was that the outer or inner part of the pier?

A. Well, about the middle of the pier, more or less. There was a scow tied up toward the end.

Q. Would you describe the 52nd Street pier, Captain?

A. Yes, sir. It is an open pier with sort of an overhang, where they dump garbage from scows.

Q. Does that overhang protrude over the water at all?

A. Yes, protrudes about 25 feet or so from the pier over the water.

Q. You mean about 25 feet high?

A. Yes.

Q. Over the deck of the pier?

A. Over the deck of the pier, yes.

Q. Does it also extend out into the slip?

A. Over the water, yes, into the slip.

Q. And that is——

A. On the north side.

Q. The north side of the 52nd Street pier?

A. Yes.

Q. Captain, I would like to go back just a little bit to the time when you were beginning to shape up to enter the slip between Pier No. One, Bush, and the 52nd Street pier, Brooklyn. Will you tell us what positions the two tugs had at that time?

150 A. Well, I can tell the definite position of the after tug, the #9. She came alongside and gave a bow line, to throw our port quarter chock, and as we start shaping into the slip, she pushed us with her bow against, holding us up against the main tide.

Q. And could you tell us the position of the DAUNTLESS #6 at that time?

A. Well, just at that time, no, sir, I didn't look forward.

Q. Could you tell us whether she was up forward or not?

A. I know she was up forward, yes, but just what she did, I

didn't notice closely, until the time they let go anchor, when I thought we were getting into danger.

Q. Captain, I show you the log of the CHRISTOPHER GALE, opened to the page headed April 6, 1946, which has been identified in a previous deposition as Respondents' Exhibit No. 1, and I ask you if any of the handwriting in this log is yours, and would you tell us which that is?

A. Yes, sir. Well, the beginning of the day is my handwriting, stating, "Bethlehem Shipyard, Hoboken, Saturday, April 6, 1946."

Then the writing "Night mate on duty, watchman on gangway—" that is my writing.

Then, at 7 o'clock, a.m., "7 a.m. Tried out steering gear, telegraph and whistle. Same found okay." That is my writing.

Q. Is there anything else on that page that is yours?

A. Yes, sir. Again, at 5 p.m., "Night mate on duty, watchman on gangway."

151 Q. As indicated in the log, did you test the steering gear and telegraph and whistle before the ship was undocked at Hoboken?

A. Yes, sir, always do that before leaving.

Q. Will you tell us how you found the equipment?

A. Everything in good working order, as we use that, good working order.

Mr. FLEISCHER: That is all. Your witness, Mr. Pyne.

CROSS EXAMINATION.

By Mr. PYNE:

Q. Captain, when this accident occurred, at that time, or about that time, did you make any written report or record of it?

A. No, sir, on account of the second mate——

Q. Is this entry in the log book the only thing you know of?

A. Yes, sir, it is in my handwriting.

Q. And between the day of the accident and today, have you made any written report to anybody at any time?

A. Well, I give statement about a month after the accident to Mr. Fleischer.

Q. To Mr. Fleischer here?

A. Yes.

Q. In the government office here?

A. Yes.

152 Q. You gave him a statement about a month after the accident happened?

A. Yes, sir.

Q. And that was the only statement you made at any time to anybody?

A. Yes, sir.

Q. Did you have any means back aft, where you were, of communicating with the pilot house?

A. Now, I had—I had no occasion on that ship to use it, but I believe there are telephones on Liberty ships.

Q. How long were you on this particular ship, Captain?

A. I was only night relieving and doing this shifting, because they had no second mate aboard. They were short.

Q. When you refer to the night mate——

A. That is from——

Q. Let me finish the question, please, Captain.

A. Yes. All right.

Q. When you refer to a night mate, what were your duties as a night mate?

A. To be in charge of the ship from 5 p.m. to 8 a.m. in the morning. You be in charge. You might be classed as master. You are in charge of the ship, whatever happens.

Q. How long before this shifting of this vessel had you been night mate?

A. On that ship?

Q. Yes.

A. I don't remember exactly.

153 Q. Well, you can refresh your memory from this log book, if you want.

A. Yes.

Q. When did you first join her?

A. A few days before, I guess, or something—here it is. It was on—what is that, the 29th? No, the 27th.

Q. What is that?

A. The 27th day of March, at 5 p.m.

Q. And when did you leave her, Captain?

A. That was at 8 a.m., April 18th.

Q. Where was she when you left her, Captain?

A. 52nd Street, Brooklyn. Same pier.

Q. So that this trip from Hoboken to 52nd Street was the only time that the vessel was under way while you were aboard her; is that right?

A. Yes, sir—well, no. Excuse me. No, no. Excuse me.

Q. Did she take a voyage?

A. They may have left—just a minute. We may have gone from Brooklyn to Hoboken, the shipyard. Wait just a minute.

Q. Well, take your log book and refresh your memory, Captain, and tell me what shifting or what voyage, if any, she made throughout the whole time you were aboard her from the time you first joined her until you left her.

Mr. PYNE: Take this off the record.

(Discussion off the record.)

154 By Mr. PYNE:

Q. Now, listen to this, Captain. Now that you have examined your log book, Captain, I understand that you joined this vessel here in New York, Hoboken, on March 27, 1946, and that you left her on April 18, 1946; that is correct, is it not?

A. Yes, sir, that's correct.

Q. Now, during that time, the only change of place or shifting of the vessel that occurred was this shifting from Hoboken to 52nd Street, Brooklyn, on April 6th, and then that was followed by leaving 52nd Street, Brooklyn, to go to an anchorage at Bay Ridge Flats, on April 16th; is that right?

A. Yes.

Q. Now, on this trip on the day the accident occurred, the trip from Hoboken to 52nd Street, Brooklyn, the vessel was using her own steering gear, Captain; is that right?

A. Yes, sir.

Q. She was using her own engines?

A. Yes, sir.

Q. And you were back aft for the purpose merely of handling lines on leaving Hoboken and again handling mooring lines at 52nd Street?

A. That is correct, and tugboat lines, of course.

Q. Tugboat lines?

A. Yes.

Q. And lines to the pier?

A. Yes, sir.

155 Q. That was your sole duty there?

A. That is right.

Q. If I understand you correctly, Captain, from where you were, back aft, you were not able to get a good view or to see what was going on on this tug, DAUNTLESS #6, up forward, were you?

A. No, not good view, no, sir, no no. I could see the tug, but not good view. What is going on on the tug, no.

Q. Now, you said, Captain, that the man or the mate who was aboard your steamship for the docking of the vessel at 52nd Street, Brooklyn, came from the tug? Did you say that?

A. I did say that, yes, I said that. Now, actually——

Q. Now, what I want to know is this: How did you know where he came from, Captain?

A. I might have said that. It is in my mind that he came from tug, but I definitely know he might have been aboard since Hoboken, come to think of it. He may have.

Q. Well, actually——

A. Yes, come to think of it——

Q. Wait a minute, please, Captain. Let me finish the question.

A. Yes.

Q. Actually, you personally have no knowledge where he came from?

A. It is in my mind he came from tug, you know, at that time, before docking, and then, again, he may have been on board some time previously.

156 Q. But you yourself didn't see——

A. No, I didn't help him over. I don't remember that.

Q. So that actually you have no real knowledge of where he came from?

A. No, not real knowledge.

Can I say something—of course, if it is not part of the statement.

After all, years back, I go, and when a man has gone through the same thing over and over again—I mean, after all, I don't remember seven years back very distinctly.

Q. That goes for all of the testimony here, Captain? It is pretty difficult after a lapse of such period, it is pretty difficult to tell things accurately?

A. Well, this thing is pretty outstanding, and things that are outstanding, you know—I mean, you know, I have done piloting and all, and when they let go the anchor, I knew, naturally, they weren't letting it go slip for the fun of it, and I started to observe.

Q. It was the letting go of the anchor——

A. Yes, yes——

Q. Please let me finish the question, Captain.

A. Yes. I am sorry.

Q. Was the letting go of the anchor and hearing that, that first called your attention to the fact that there was any trouble or anything wrong?

A. That is right.

Q. And your vessel already then was drifting down broadside toward the portside?

A. Yes.

157 Q. Drifting pretty rapidly, I understood you to say?

A. Yes, pretty rapidly, yes, sir.

Q. Did you ever serve on a tugboat yourself, Captain?

A. Yes, sir, I have.

Q. Where about?

A. At Bushey's.

Q. When was that?

A. Oh, in 1941, for a while.

Q. What job did you do on the tug?

A. I was mate.

Q. What tug was that?
A. On the BARRINGTON.
Q. The BARRINGTON?
A. Yes.
Q. What type of work did she do, canal work?
A. Coast work and up to Greenland, from Montreal.
Q. Towing barges?
A. Yes.
Q. How long were you on that tug?
A. I was there about three months, three trips.
Q. Did you ever work on any other tug?
A. Yes, on the CRUSADER I, Bushey's.
Q. Doing the same type of work?
A. No, up in Great Lakes, doing canaling.
Q. What type of work did she do, that tug?
A. Towing barges.

158 Q. Now, was that all your tug experience, Captain?
A. Well, actually tug, yes. I have been a little here and there, but nothing much.

Q. Now, I asked you, Captain, whether you had back aft, where you were, any means of communicating with the pilot house yourself, and you answered me something about Liberty ships in general.
A. Yes. I never use it in that ship, though, no, sir.
Q. You never used it on this ship?
A. No.
Q. Do you know whether, as a matter of fact, there was aft—do you recall that—whether or not there was, in fact, any telephone or any other means of communicating from where you were aft on the GALE, up to her pilot house?
A. On that very ship, I couldn't remember.
Q. You don't remember?
A. No, sir.
Q. She was light, wasn't she, Captain?
A. Yes.
Q. High out of water?
A. Yes.
Q. And would she be higher, have much more freeboard or side exposed forward than midships?
A. Yes, more forward. Generally, only a few feet forward, and generally 15 or 16 aft.
Q. Do you mean she would have about 15 or 16 feet of freeboard aft?

159 A. No, she would have about 10 foot more freeboard aft than forward.

Q. That is her draft, you are talking about, Captain? I am talking about her freeboard. Do you understand——

A. Yes.

Q. You understand what I mean by freeboard, don't you, Captain?

A. Yes. Well, she is flush deck ship.

Q. Her side which was between her main deck and the water's edge, the side out of water, that is what I am referring to as freeboard.

A. Yes.

Q. Now, aft do you mean she had about 15 or 16 feet freeboard, her side out of water at the after end?

A. I didn't refer to that——

Q. Give us your best estimate, Captain.

A. Well, yes, about that.

Q. And midship about what would it be?

A. Main deck midships would be few feet more.

Q. Right up at her bow, the forward end?

A. Ten feet more than it was astern, about.

Mr. PYNE: I think that is all I have.

REDIRECT EXAMINATION.

By Mr. FLEISCHER:

Q. Captain, you said you did some piloting work?

A. Yes, for Gulf Refining, and I mean—excuse me. Now, can we say something——

160 Q. Just continue and tell us what you want, Captain.

A. My piloting experience, when I was first master with Gulf in 1942, we done our own piloting in all ports from one end to the other, and all docking.

Q. In other words, you took ships into and out of docks?

A. Yes, sir. That was master and pilot.

Q. Did you use tugs on some occasions and did you go without on others?

A. On some occasions tugs, and some without. It depends where you were, what piers you were going to, and you tried to avoid tugs as much as possible—you know, the expense.

Q. Captain, if I were to tell you that it was planned to warp the CHRISTOPHER GALE into the slip and let her portside midship down onto the corner of Pier One, Bush, would you say that that was a normal way of docking a vessel under the circumstances which existed at the time that the GALE was going into her berth?

Mr. PYNE: I object to that as leading and also for the other reasons, the objections as to which will be reserved for the trial under the stipulation.

Q. Now, will you answer the question, Captain?

A. Well, if he was going to wrap her on the corner of Pier One, which means the GALE's midships about—should be midships or thereabouts—would touch end of Pier One, corner of Pier One.

Q. That is right. Would you say that was a normal way to take the ship into the slip?

161 Mr. PYNE: Same objection.

A. I would think the forward tugboat would be further up toward the bow, where she could face the other way, hold up the bow, and before she gets jammed, she could back up the ship and out of danger.

Q. Without going into the position of the tugs, but just assuming that two tugs are assisting a vessel, is that or is that not, in your opinion, a normal way of attempting to dock a vessel——

Mr. PYNE: Same objection.

Q. (Continuing) —in that slip, under those circumstances?

A. In any opinion, the after tug was perfect——

Q. I say, without considering the tugs at the moment. Is that a normal way to bring in a ship, under the circumstances?

A. Yes, sir; yes, sir; yes, sir. It was wind and tide the same way, to warp the ship in Pier One, yes.

Q. Now, under those circumstances, and endeavoring to dock a ship by resting her midship section on the Pier One corner, where would the tugs best be placed?

A. One nearest the stern and one nearest the bow as possible.

Q. And what position should the bow tug take as the ship gets closer to Pier One?

A. Well, in that case, she should be holding up her bow and be in such a shape that she could back out clear between the ship and the dock, if necessary.

162 Q. In other words, am I correct if I state that you mean that her bow would be pushing on the port bow of the ship?

A. That is right.

Q. And her stern would lead back into the slip?

A. That is right.

Mr. PYNE: I object to that as leading and for the other objections that have been reserved.

Q. Did I describe your position correctly?

A. Yes, sir, that is right.

If I may add, as you asked me if that was proper way, I mean that is in my estimation the way to warp a ship in Pier One, to head into 52nd Street pier, it was, yes, sir, because they have an overhang there, and there was also a scow barge near the end of 52nd Street pier on the north side of it, so that was very excellent

idea to warp on end of Pier One and head in so as to avoid the overhang, and also clearing the barge which was laying near the end, the outer end.

Q. Captain, you hold a master's license, do you not?

A. Yes, sir, ocean unlimited.

Q. And you are now working as chief mate for Gulf Oil, on one of their ships?

A. Yes.

Q. Are you familiar with the regular duties of a second mate?

A. Yes, sir.

163 Q. And were you performing the regular duties of a second mate on April 6, 1946, when you were aboard the Christopher GALE?

A. Yes, sir, I was.

Q. And at the time of the contact between the ship, the tug and the pier, how was the DAUNTLESS #6 heading?

A. At the time of contact?

Q. That is right.

A. Well, she was heading same way with the ship, parallel with the ship, heading same way.

Q. And, Captain, could you characterize to us how the wind was blowing, whether or not there were gusts of wind, or whether it was——

A. As near as I can remember, the wind was gusty, you know. At times, from 4 to 6. That is what I thought, I say—from moderate to, say—from fresh to gusty.

Q. Was that the condition at the time you left Hoboken?

A. About the same, yes, sir.

Q. And was that the condition at the time you were docking at 52nd Street, Brooklyn?

A. Yes, sir.

Q. Captain, based upon your experience on vessels and in doing piloting work, can you tell us, in your opinion, what the cause of the contact was?

Mr. PYNE: I object to the question.

Q. Go ahead and answer, Captain.

A. Well——

164 Q. If you can.

A. Yes, I can. I mean, in a way, it sounds—well, I mean, what was the tugboat doing near the midship, to contact it?

Q. I mean, do you feel that if there were more tugs or more power, that the ship could have been held up to the wind and the tide?

Mr. PYNE: I object to the question.

A. Yes, sir, more power, yes, sir. It was the wind and tide that set it down to Pier One, I mean, unexpectedly—I mean unexpectedly than they figured. But, actually, the tug got caught in between, unexpectedly. Evidently, they thought they could have held her.

Mr. FLEISCHER: That is all.
Mr. PYNE: Nothing further.

(Whereupon, at 4:30 p.m., the deposition was closed.)

165 In United States District Court Eastern District of New York
NEW YORK

Admiralty No. 18567

APPEARANCES:

Pyne, Lynch & Smith, Esqs.
Proctors for the Libellant
By Anthony V. Lynch, Esq., Advocate
Frank J. Parker, Esq.
United States Attorney for the Eastern District of New York
By Gilbert S. Fleischer, Esq., Advocate

OPINION—May 15, 1953

Galston, J.

On April 6, 1946 the tug DAUNTLESS No. 6 sustained damage while assisting in the docking of the CHRISTOPHER GALE at 52nd Street, Brooklyn.

The facts are fairly clear. Several days before the accident a representative of the Luckenbach Steamship Company as general agent for the United States of America, the owner of the CHRISTOPHER GALE, arranged for the towage of the vessel from Hoboken to the 52nd Street pier in Brooklyn. Tarr, who was the acting operating manager of the Luckenbach Company, admitted that at the time he made the arrangement for the towage he was aware of the terms of the so-called pilotage agreement of the conditions of
166 towing. The pilotage agreement is in evidence as Exhibit 1. In arranging for the towage he testified that he relied upon the Dauntless Towing Line to furnish a sufficient number of tugs to carry out the towage.

The towage was undertaken by the tugs DAUNTLESS No. 6 and DAUNTLESS No. 9 and a docking pilot, Robert Nielson, was dispatched to the Hoboken yard on the morning of April 6th. The vessel then proceeded down the river to the southward of Governor's Island, and then down the Bay Ridge channel to a point in the vicinity of 52nd Street and Pier 1, Bush Docks. The tugs followed

the ship down as she was proceeding under her own power and did not need the assistance of the tugs in the open waters of the Bay.

Nielson was on the bridge of the GALE and gave orders to the tugs and to the engine helm of the GALE, when approaching 52nd Street. He directed the No. 6 to take a position to the port bow, and No. 9 on the port quarter of the ship.

It is important to note that at the time of the occurrence, the tide was flood, and the wind was southwest, blowing in gusts with a strength of about twenty to twenty-five miles per hour.

The ship was maneuvered so as to swing between Pier 1, Bush, and 52nd Street, but at the time the wind and the tide caused the port bow of the GALE to sag down toward the southerly corner of Pier 1. An effort to control the sag by letting the starboard anchor go was unsuccessful, and the pilot blew for the DAUNTLESS No. 6 to give an extra jingle and go full ahead. When the captain of the DAUNTLESS No. 6 realized that a collision was im-
167 minent, he ordered his spring line to be slackened, and tried to go ahead so as to prevent the tug from being crushed by the ship against the dock. But his efforts were unsuccessful. It should be noted too that at no time did the pilot give the DAUNTLESS No. 6 an order to pull away.

It would seem that the sole cause of the accident was the negligence of the docking pilot in his attempt to enter the slip knowing that he could not overcome the force of the wind and tide and keep the CHRISTOPHER GALE from sagging down on Pier 1. The maneuvers of the tug DAUNTLESS No. 6 did not contribute to the accident. The damage caused to the DAUNTLESS No. 6 must be laid to the fault of the pilot of the CHRISTOPHER GALE.

The Pilotage clause of the towage contract does not relieve the respondents from responsibility. Such clause in common use in and around the New York Harbor reads as follows:

> "When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tug, their owners, agents, or charterers shall be liable for any damage resulting therefrom." I had occasion
> 168 to consider this clause in Dalzell v. The New York 77 Fed. Supp. 793, and wrote:
>
> "Nor can any fault, of course, be ascribed to the tug LLOYD DALZELL. She was under orders from those in command of the

CHRISTIAN HOLM (the steamer which was being assisted). The pilotage clause of the towage contract imposed responsibility on the owner of the vessel which was assisted by the tug. That Romano (the pilot who was on the bridge of the ship) was in the general employ of the libellant cannot relieve the impleaded respondent of liability."

See also: Moran Towing & Transportation Co., Inc. v. Navigazione Libera Tricstina S. A., 92 Fed. (2d) 37; cert. den'd 302 U. S. 744; Sun Oil Co. v. Dalzell Towing Co., 287 U. S. 291; Mathiasen Towing Co. v. U. S. A. 1949 A. M. C. 1831.

The libellant may have a decree against the respondent, United States of America. The libel against the Luckenbach Steamship Company, as agent for the United States of America, will be dismissed under the ruling of the Supreme Court in Cosmopolitan Shipping Company v. McAllister, 337 U. S. 783.

Appropriate findings of fact and conclusions of law will be filed concurrently with this opinion.

U. S. D. J.

169 In United States District Court

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed May 15, 1953

In conformity with the foregoing opinion, I make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. At all times material to the issues herein libellant was the owner of the tug DAUNTLESS #6.

2. In the regular course of business and over a period of years the DAUNTLESS #6 was used to assist ships in docking and undocking in the Harbor of New York, having handled 113 ships during the year 1945, and 49 ships in the first four months of 1946 up to the date of this accident.

3. On April 6, 1946 while assisting in docking the light United States Government vessel CHRISTOPHER GALE at 52nd Street, Brooklyn, the No. 6 was seriously damaged by being crushed between the port bow of the GALE and the outer or southerly corner of Pier 1 Bush docks.

4. At the time of this occurrence the tide was flood, the wind was Southwest and blowing in gusts with an hourly strength of 20 to 25 miles per hour.

170 5. At the time of this accident the GALE was using her own power and the licensed pilot furnished by DAUNTLESS directed her helm and engine movements, and the movements of the assisting tugs DAUNTLESS #6 and DAUNTLESS #9.

6. A schedule of rates of Dauntless Towing Line was sent to

Luckenbach Steamship Company General Agents for the United States Government, the owner of the CHRISTOPHER GALE, containing the pilotage clause under the terms of which the pilot becomes the servant of the vessel assisted.

7. At the time Luckenbach's representative made arrangements with DAUNTLESS for the towage of the GALE he was aware of the terms of the pilotage agreement.

8. While the CHRISTOPHER GALE was undocking at Fletcher's and while proceeding down the Bay none of the officers of the CHRISTOPHER GALE questioned the towage power of the tugs DAUNTLESS #6 and DAUNTLESS #9 or requested an additional tug or tugs.

9. The sole proximate cause of the disaster was the negligence of the docking pilot in persisting in his attempt to enter the slip after he knew or should have known that he could not overcome the force of the wind and tide and keep the CHRISTOPHER GALE from sagging down on Pier 1.

10. The proper and prudent maneuver on the part of the GALE and the docking pilot was to reverse the ship's engines and back out of the slip.

171 11. The maneuver of the tug DAUNTLESS #6 did not contribute to the accident.

12. By reason of the crushing of the DAUNTLESS #6 between the CHRISTOPHER GALE and Pier 1 Bush Docks, the libellant sustained considerable damage.

CONCLUSIONS OF LAW

1. The Pilotage Clause of the towage contract imposed in rem responsibility on the United States of America as owner of the CHRISTOPHER GALE for the damage sustained by the DAUNTLESS No. 6, by reason of the negligence of the docking pilot who was the servant of the ship.

2. The fact that Nielson, the docking pilot, was in the general employ of the libellant cannot relieve the owner of the CHRISTOPHER GALE of liability.

3. The libellant is entitled to recover the damages sustained by the tug DAUNTLESS #6 by reason of being crushed between the end of Pier 1 Bush Docks and the side of the CHRISTOPHER GALE, with interest and costs.

Respectfully submitted,

CLARENCE G. GALSTON,
U. S. D. J.

May 15, 1953.

172 In United States District Court

INTERLOCUTORY DECREE—June 1, 1953

This case having come on to be heard on the pleadings and proof adduced by the respective parties and having been argued and submitted, and the Court after due delibration having handed down its opinion in writing and its findings of fact and conclusions of law holding the respondent United States of America liable for the damage sustained by the tug DAUNTLESS #6 and directing a decree for the libellant herein with costs as against the respondent United States of America and dismissing the libel against Luckenbach Steamship Co., Inc., as agent for the United States of America:

Now, on motion of Pyne, Lynch & Smith proctors for the libellant, it is

ORDERED, that the opinion of this Court together with findings of fact and conclusions of law heretofore filed on the 15th day of May, 1953 be and the same are hereby adopted as the Court's findings of fact and conclusions of law pursuant to Supreme Court Rule 46½; and it is further

ORDERED, ADJUDGED, AND DECREED that the libellant recover of and from the respondent United States of America the damages sustained by the libellant by reason of the matters and things alleged in the libel, with interest and costs; and it is further.

173 ORDERED, that it be referred to William P. Lage, Esq., Commissioner, to ascertain and compute the amount due to the libellant in the premises and to report the same to this court with all convenient speed.

Dated: Brooklyn, N. Y.

June 1, 1953.

CLARENCE G. GALSTON
United States District Judge.

174 In United States District Court

ASSIGNMENT OF ERROR OF THE UNITED STATES OF AMERICA—Filed September 4, 1953

United States of America, respondent, hereby assigns error to the decision, findings of fact and conclusions of law and decree of the District Court of the United States for the Eastern District of New York in the above entitled suit as follows:

1. In that the Court found that the sole proximate cause of the damage to the Tug DAUNTLESS #6 was the negligence of the docking pilot on the bridge of the SS CHRISTOPHER GALE.

2. In that the Court found that it was negligent for the docking pilot to persist in his attempt to enter the slip between Pier 1, Bush Terminal and the 52nd Street Pier, Brooklyn, N. Y. under the circumstances in this case.

3. In that the Court found that the proper and prudent maneuver on the part of the GALE and the docking pilot was to reverse the ship's engines and back out of the slip.

4. In that the Court found that the maneuvers of the Tug DAUNTLESS #6 did not contribute to the accident.

5. In that the Court failed to find that the proximate cause for the disaster was the failure on the part of the Dauntless
175 Towing Line to furnish sufficient towage assistance or tugs with adequate pushing power to perform the shifting operation.

6. In that the Court failed to find the Dauntless Towing Line was at fault, despite the provisions of the Standard Pilotage Clause, for failing to provide sufficient towage assistance or tugs with adequate pushing power.

7. In that the Court failed to find that it is the custom in New York Harbor for the towing company to select the number, type and power of the tugs to be used in the shifting operation.

8. In that the Court found that the Pilotage Clause of the Towage Agreement imposed liability on the United States of America, as the owner of the CHRISTOPHER GALE, for the damage sustained by the Tug DAUNTLESS #6 caused by the negligence of the docking pilot in the general employ of Dauntless Towing Line.

9. In that the Court failed to find that, to libelant's knowledge, the DAUNTLESS #6 was neither by dimensions nor power adequate to serve as an assisting tug on a vessel of the size and tonnage of the CHRISOPHER GALE under the foreseeable circumstances of this case.

10. In that the Court failed to find that the DAUNTLESS #6 was independently at fault for the disaster.

11. In that the Court failed to find that the DAUNTLESS #6 was improperly manned.

176 12. In that the Court failed to find that the DAUNTLESS #6 had so improperly arranged and fastened her towing lines aboard the tug as to prevent her from pushing at right angles to the ship as ordered by the docking pilot.

13. In that the Court failed to find that the DAUNTLESS #6 as she was made fast to the CHRISTOPHER GALE was unable to push at any angle greater than 30-35 degrees and thus could not make use of her maximum pushing power.

14. In that the Court failed to find that the DAUNTLESS #6 should have made her spring line fast to the stem bitt of the tug instead of to the forward cavil bitt.

15. In that the Court failed to find that the DAUNTLESS #6 had adequate engine power to perform the assistance required of her in this case.

16. In that the Court failed to find that the DAUNTLESS #6 was at fault for not taking proper or timely avoiding action.

17. In that the Court failed to find that by custom the master of the DAUNTLESS #6 owed his first duty to the safety of his crew and his vessel and failed to take timely action for their protection even though he had ample time to do so.

18. In that the Court failed to find that the DAUNTLESS #6 did not release her lines to the ship until after contact.

177 19. In that the Court failed to find that the Standard Pilotage Clause, if valid, provides only for indemnity to the Towing Line in the event of liability of the Towing Line to third parties or to the owner of the ship assisted but does not permit recovery from the owner of the vessel being assisted for loss or damage to its own equipment by its own servant's negligence.

20. In that the Court failed to find that Robert C. Nielson, docking pilot, remained as the employee of Dauntless Towing Line for all purposes, despite the provisions of the Standard Pilotage Clause.

21. In that the Court failed to find the Standard Pilotage Clause void as against public policy.

22. In that the Court failed to find that the close relationship of Robert C. Nielson to the management of Dauntless Towing Line together with the various executive duties which he himself had in his employment with Dauntless Towing Line made the application of the Pilotage Clause in this case void as against public policy.

23. In that the Court failed to find that there was no fault on behalf of any of the officers or crew of the SS CHRISTOPHER GALE and that all orders to them were properly and promptly executed and that the vessel and all her mechanism were operating in perfect order.

24. In that the Court failed to find that the southwest wind of

20 to 25 miles per hour and the flood tide flowing at the time were not unusual weather conditions in New York Harbor.

178 25. In that the Court failed to find that the docking pilot used good judgment in adopting the plan for docking the vessel whereby she was to be taken into the slip and warped around the south corner of Pier 1, Bush Terminal under the circumstances present.

26. In that the Court failed to find the Dauntless Towing Line at fault for the damage to the DAUNTLESS #6.

27. In that the Court failed to find that an unfavorable inference should be drawn from the failure on the part of libelant to produce or satisfactorily explain the absence of certain of libelant's key witnesses among whom were the engineer and deckhand of the DAUNTLESS #6.

Dated: New York, N. Y., September 4, 1953.

LEONARD P. MOORE,
United States Attorney,
Proctor for Respondent
U. S. Courthouse—Foley Square,
New York 7, N. Y.

179 In United States District Court

NOTICE OF APPEAL—Filed June 15, 1953

SIR:

PLEASE TAKE NOTICE that the United States of America, respondent in the above entitled suit, hereby appeals to the United States Court of Appeals for the Second Circuit from the Interlocutory Decree entered herein on the 1st day of June, 1953 and from each and every part of said Decree as well as from the whole thereof.

Dated: New York, N. Y.
June 12, 1953.

Yours, etc.
FRANK J. PARKER
United States Attorney
Proctor for Respondent
Office & P. O. Address
U. S. Courthouse
Foley Square
New York 7, N. Y.

To:

MESSRS. PYNE, LYNCH & SMITH
Proctors for Libelant
Office and P. O. Address:
116 John Street
New York, N. Y.

180 In United States District Court

STIPULATION AS TO EXHIBITS

(Title Omitted)

IT IS HEREBY STIPULATED AND AGREED by and between the proctors for the respective parties hereto that

Libelant's Exhibits 1, 2, 3 and 4

Respondent's Exhibits A, B, C, D, E, F, G & H

need not be printed in the transcript of record on appeal but copies thereof may be handed to the Court and referred to upon the argument of the appeal herein with the same force and effect as if printed in the record and that three copies of said exhibits shall be furnished to the Court as provided in Rule 18 (a) of the Rules of the United States Court of Appeals, Second Circuit and that one copy
181 be furnished to each proctor for the respective parties in said appeal.

Dated: New York, N. Y.

October 13, 1953.

PYNE, LYNCH & SMITH,
Proctors for Libelant-Appellee
LEONARD P. MOORE
By G. S. FLEISCHER
United States Attorney
Proctor for Respondent-Appellant

182 STIPULATION AS TO RECORD (omitted in printing)

183 Clerk's Certificate to foregoing transcript omitted in printing.

184 In United States Court of Appeals for the Second Circuit

No. 144—October Term, 1953.

Argued February 1, 1954 Decided February 15, 1954.

Docket No. 22914

CHRIS NIELSON, *et al.*, copartners trading under the firm name and style of Dauntless Towing Line, owner of the tug "DAUNTLESS No. 6," LIBELANT-APPELLEE

v.

UNITED STATES OF AMERICA, as owner of the SS "CHRISTOPHER GALE," RESPONDENT-APPELLANT

Before: CLARK, FRANK AND HINCKS, CIRCUIT JUDGES.

Appeal from the United States District Court for the Eastern District of New York, Clarence G. Galston, *Judge*.

Appeal by the United States from an interlocutory decree in admiralty holding it, as owner of the SS CHRISTOPHER GALE, solely at fault for damage sustained by the tug DAUNTLESS No. 6 while assisting in the docking of the steamship at 52d Street, Brooklyn, on April 6, 1946.

185 GILBERT S. FLEISCHER, Atty., Dept. of Justice (Leonard P. Moore, U. S. Atty., New York City, and Walter L. Hopkins and E. Robert Seaver, Attys., Dept. of Justice, on the brief), *for respondent-appellant*.

ANTHONY V. LYNCH, JR., New York City (Pyne, Lynch & Smith and Vincent J. Ryan, New York City, on the brief), *for libelant-appellee*.

OPINION

PER CURIAM:

Affirmed on the opinion of District Judge Galston below, D. C. E. D. N. Y., 112 F. Supp. 730.

186 In United States Court of Appeals for the Second Circuit

CHRIS NIELSON, ET AL., LIBELLANT-APPELLEE

v.

UNITED STATES, as owner of S.S. CHRISTOPHER GALE & LUCKENBACH S.S. CO., INC., RESPONDENTS-APPELLANTS

Appeal from the United States District Court for the Eastern District of New York.

JUDGMENT—February 15, 1954

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs on the opinion of District Judge Galston below, D. C. E. D. N. Y., 112 F. Supp. 730.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. DANIEL FUSARO,
Clerk.

187 (File endorsement omitted)

188 Clerk's Certificate to foregoing transcript omitted in printing.

189-191 Supreme Court of the United States

(Title omitted)

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI —Filed May 14, 1954

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 14, 1954.

STANLEY REED,
Associate Justice of the Supreme Court of the United States.

Dated this fifteenth day of May, 1954.

192 (File endorsement omitted.)

193-194 Supreme Court of the United States

No. 210, October Term, 1954

(Title omitted)

ORDER ALLOWING CERTIORARI. Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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HAROLD B. WILEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1954

THE UNITED STATES OF AMERICA, AS OWNER OF THE S. S. CHRISTOPHER GALE, PETITIONER

v.

CHRIS NELSON, ET AL., CO-PARTNERS TRADING UNDER THE TRADE NAME AND STYLE OF DAUNTLESS TOWING LINE, AS OWNERS OF THE TUG DAUNTLESS #10

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

[illegible]
Solicitor General
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

THE UNITED STATES OF AMERICA, AS OWNER OF THE S. S. CHRISTOPHER GALE, PETITIONER

v.

CHRIS NIELSON, ET AL., CO-PARTNERS TRADING UNDER THE FIRM NAME AND STYLE OF DAUNTLESS TOWING LINE, AS OWNER OF THE TUG DAUNTLESS # 6

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered in the above cause on February 15, 1954.

OPINIONS BELOW

The opinion of the district court (R. 165-168) is reported at 112 F. Supp. 730. The *per curiam* opinion of the Court of Appeals (R. 185), affirming

on the opinion of the district court, is reported at 209 F. 2d 958. These opinions are not appended to this petition because they are contained in the printed record, nine copies of which are being filed herewith. See Rule 23 (1) (i) of the Rules of this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1954 (R. 186). By order dated May 15, 1954, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Reed to and including July 14, 1954 (R. 188).

QUESTIONS PRESENTED

1. Whether the usual "pilotage clause" in a towage contract is properly interpreted as making the tow liable to the owner of the tug for damage to the tug incurred through the negligence of the tug owner's own employee in the course of the towing operation.

2. Whether, if so interpreted, the clause is opposed to sound public policy, and hence invalid.

STATEMENT

On April 6, 1944, the S. S. CHRISTOPHER GALE, a merchant ship owned by the United States, was being docked at Pier 1, Bush Docks, in Brooklyn. The ship was light, but under its own power, and had the assistance of two tugs, the DAUNTLESS # 6 and the DAUNTLESS # 9. Entry into the slip was attempted despite a strong wind and tide from starboard, and the ship sagged down to port, notwithstanding the dropping of a starboard anchor

and the efforts of the tugs, which were positioned on the port bow and quarter. The DAUNTLESS # 6 was caught between the ship and the pier and suffered severe damage. (R. 165-167, 169-170.)

Respondents, the Dauntless Towing Line, owners of the tug, brought a libel against the United States under the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. 741, to recover for this damage (R. 4-9). The issue was tried on the question of liability alone, and the trial court found that the accident was caused solely through the negligence of the docking pilot of the CHRISTOPHER GALE—who directed the movements of both ship and tugs—in attempting to enter the slip "after he knew or should have known that he could not overcome the force of the wind and tide" (R. 170). This pilot was in the general employ of Dauntless Towing Line, owner and operator of DAUNTLESS # 6 (R. 75, 166, 171).

Luckenbach Steamship Company, the general agent of the United States as owner of the CHRISTOPHER GALE, had arranged for the towage (R. 165, 170), and was aware that the terms of the Dauntless Line included the form of "pilotage clause" in common use about New York harbor (R. 165-167, 170). This clause provided (R. 167):

> When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat cap-

> tain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents, or charterers shall be liable for any damage resulting therefrom.

Respondents urged that this clause made the United States liable for the damage to the tug, even though the negligent pilot was in the respondents' general employ. The United States argued, on the other hand, that as the clause provided only that the tug-owners should not be "liable for any damage," it was not intended to require the tow to indemnify the tug owners for loss suffered through the negligence of their own employees, and further that if it were so intended it offended public policy and was void. The trial court rejected these contentions and ordered recovery against the United States (R. 167-168, 171).[1] The Court of Appeals for the Second Circuit affirmed on the opinion below (R. 185).

REASONS FOR GRANTING THE WRIT

Together with *Bisso* v. *Inland Waterways Corp.*, No. 50, and *Boston Metals Co.* v. *S. S. Winding Gulf*, No. 70, this case presents the Court with an

[1] A libel against Luckenbach Steamship Company as "charterer and/or agent" was dismissed on the authority of *Cosmopolitan Shipping Company* v. *McAllister*, 337 U. S. 783.

unusual opportunity to clarify, in their major aspects, the now uncertain rules governing the common clauses by which tugs seek to relieve themselves of responsibility for damage occurring in a towing operation. Authoritative rulings by this Court will go far to settle this phase of admiralty law which has long been both an irritant and a source of continuing litigation.

1. Clauses relieving towing companies from the consequences of negligence for which they would otherwise be responsible are a normal part of towage contracts.[2] Precise information is not available on the extent to which the various forms of the clauses are found in such contracts in the different localities, but the litigation which has followed upon their use provides some gauge of their substantial uniformity and their well nigh universal use. There are now pending in this Court petitions for writs of certiorari in two other cases involving similar exculpatory clauses: *Bisso* v. *Inland Waterways Corp.*, No. 50, and *Boston Metals Co.* v. *S. S. Winding Gulf*, No. 70. These cases arose from casualties on the Mississippi River,[3] and off the coast of New England, respectively, and similar clauses have been involved in cases from

[2] The liability and responsibility of the respondents for the acts of the docking pilot, in the absence of the disputed "pilotage clause", is clear. *Sturgis* v. *Boyer*, 24 How. 110; *The West Eldara*, 104 F. 2d 670 (C.A. 2).

[3] An *amici* brief was filed with the Fifth Circuit in the *Bisso* case by counsel for eight companies operating harbor or river tugs on the Mississippi River and at New Orleans and Mobile, all of which companies use contracts containing exculpatory clauses.

the Great Lakes (*Great Lakes Towing Co.* v. *Bethlehem Transportation Corp.*, 65 F. 2d 543 (C.A. 6)), the southern Atlantic coast (*Calzavaro* v. *Planet Steamship Corp.*, 31 F. 2d 885 (C.A. 4)), and the Pacific (*Mylroie* v. *British Columbia Mills Tug & Barge Co.*, 268 Fed. 449 (C.A. 9), affirmed, 259 U. S. 1). The district court below found that the challenged clause was "in common use in and around the New York harbor" (R. 167), the most important port in the nation. Moreover, exculpatory provisions of this general nature have appeared in towing contracts for at least eighty years. *The Syracuse*, 12 Wall. 167.

Yet the effect and validity of these provisions—questions of manifest importance to the entire maritime industry—are still uncertain and unclear, a constant source of litigation, a bar to settlements, and an unsettling factor in an important area of the maritime economy. And the confusion has come about largely because the position of this Court, expressed in three opinions, has been given conflicting interpretations ever since the issue first was discussed. It is for that reason that clarification of the issue is a task which only this Court can effectively perform.

In *The Syracuse*, 12 Wall. 167, the Court first encountered the problem when confronted with a contract which provided that a vessel was towed "at the risk of her master and owners." The Court declared (12 Wall. at 171):

> * * * if it be true * * * that, by special agreement, the canal-boat was being towed at

> her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences.

In the next fifty-eight years, disputes arose over whether the Court had found the exculpatory provision in violation of public policy or simply inapplicable when the tug was negligent. The Ninth Circuit twice held that the decision invalidated any attempt by a towing vessel to contract against its own negligence. *Alaska Commercial Co.* v. *Williams*, 128 Fed. 362; *Mylroie* v. *British Columbia Mills Tug & Barge Co.*, 268 Fed. 449, affirmed on other grounds, 259 U. S. 1. The Second Circuit twice held cognate clauses valid when their intention to absolve was clearly stated. *The Oceanica*, 170 Fed. 893, certiorari denied, 215 U. S. 599; *Ten Eyck* v. *Director General of Railroads*, 267 Fed. 974; see also *Winslow* v. *Thompson*, 134 Fed. 546, 551 (C.A. 1); *The Pacific Maru*, 8 F. 2d 166, 171 (S.D. Ga.).

In 1928, this Court again took up the question in *Compania de Navegacion Interior* v. *Fireman's Fund Insurance Company*, 277 U. S. 66, commonly known as *The Wash Gray*. That towage contract

provided that except for the hawser, "all other risk and expense" were "to be borne by" the tow, and that the towing vessel "is not responsible in any way for loss or damage to" the tow (277 U. S. at 73). At issue was the liability to the tow of its insurers who had stipulated that the policy was to be null and void to the extent that the tow had released any right of recovery against a third party. The exculpatory clause was claimed as such a release. Citing with approval that part of *The Syracuse* which we have quoted above, the Court held that the clause did not release the owners of the towing vessel from claims due to the negligence of its master and crew (p. 73) and said (p. 74), "In view of this state of the law, the towing contract here shown was not a fact material to the risk, a concealment of which from the underwriters would injure them or avoid the policy."

But the question whether a towing vessel may transfer its responsibility for negligence was not yet clearly decided. Expressing doubt that *The Wash Gray* had overruled its decisions in *The Oceanica* and *Ten Eyck* v. *Director General of Railroads* (*supra*, p. 7), the Second Circuit, in *Sun Oil Company* v. *Dalzell Towing Company*, 55 F. 2d 63, without deciding the question, upheld a clause which provided:

> When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain becomes the servant of

> the owners in respect to the giving of orders to any of the tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom.

This Court affirmed, 287 U. S. 291, declaring that (at p. 294):

> There is no foundation in this case for the application of the doctrine that common carriers and others under like duty to serve the public according to their capacity and the terms of their undertaking cannot by any form of agreement secure exemption from liability for loss or damage caused by their own negligence.

But the opinion also goes on to take special note of the particular circumstances of the case—the grounding occurring in open channel while the tugboat captain was acting as pilot but with the ship entirely unaided by the tugs (287 U. S. at 294):

> Respondent's responsibility is not to be extended beyond the service that it undertook to perform. It did not furnish pilotage.[4]

Since the *Sun Oil* decision, the lower courts have, by and large, upheld exculpatory provisions without reference to distinctions between the type of clause appearing in *The Syracuse* and *The Wash*

[4] Respondents' employee in the instant case was directing the docking of the CHRISTOPHER GALE with the assistance of tugs, and thus was engaged in exactly that service which the respondents undertook to perform.

Gray and that in *Sun Oil*. See *Bisso* v. *Inland Waterways Corporation*, 211 F. 2d 401 (C.A. 5), pending on petition for a writ of certiorari, No. 50, this Term; *Boston Metals Co.* v. *S. S. Winding Gulf*, 209 F. 2d 410 (C.A. 4), pending on petition for a writ of certiorari, No. 70, this Term; *The Primrose*, 3 F. Supp. 267 (E.D. N.Y.); *The John J. Feeney*, 3 F. Supp. 270 (E.D. NY); *The Melvin and Mary*, 23 F. Supp. 398 (E.D. N.Y.); *The Francis Killian, Jr.*, 26 F. Supp. 323 (E.D.N.Y.); *contra: Petterson Lighterage & Towing Corp.* v. *The J. Raymond Russell*, 87 F. Supp. 467 (S.D. N.Y.). On the other hand, the Sixth Circuit, while not directly presented with the question, has indicated its belief that *Sun Oil* was intended to be limited to the situation where the sole motive power was that of the vessel, and the towing company's employee was acting solely as a pilot. *Great Lakes Towing Company* v. *Bethlehem Transportation Corp.*, 65 F. 2d 543. And, further, the two earlier decisions of the Ninth Circuit have never been erased.

The condition of the law, then, is such that of perhaps the two foremost treatises in the field of admiralty one states that the release from negligence is valid, 1 Benedict, *Admiralty*, § 100 (6th Ed. 1941), and the other states that it is not, Robinson, *Admiralty*, 664, 672 (1939).

2. An especially grave doubt attaches to the validity of the "pilotage clause" in this case as it was applied by the courts below. For it was held not only to preclude recovery against the towing company for the negligent acts of its employees,

but to require indemnity from the tow for injuries sustained by the tugs through those same acts. In *The Syracuse* this Court declared that "the policy of the law * * * does require on the part of the person engaged in [the towing vessel's] management, the exercise of reasonable care, caution, and maritime skill * * *." 12 Wall. at 171. It may not be incompatible with this declaration to permit the tow to bear its own risks in a necessarily hazardous operation without recourse against the tug, for the tug must always be looking to its own safety. But if there is any validity in the interpretation given *The Syracuse* by the Ninth Circuit in the *Alaska Commercial Company* and *Mylroie* cases (*supra*, p. 7),[5] the protection of the *Sun Oil* decision cannot be extended to relieve the tug, not only of all liability, but of all risk even to itself. Such an application, moreover, places the tugboat captain or pilot, when testifying, in a position of conflicting interest which the courts should be loathe to encourage.

3. Even if the towing company may validly transfer all of its responsibility to its tows, it seems

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[5] Cf. Judge Coxe dissenting in *The Oceanica*, 170 Fed. 893, 896 (C.A. 2):

> The wisdom of the rule cannot be doubted. It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness and neglect. The same reasons for prohibiting such a contract in the case of common carriers apply, though not, perhaps, to the same extent, in the case of a towage contract. In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it.

clear that it has not done so here by a clause which provides that neither the company nor its vessels "shall be *liable* for any damage resulting" from the acts of its captains or licensed pilots aboard a tow (emphasis added). This clause does not say that the company shall be saved harmless or free from any loss; it provides only that the company shall be free from liability. What was promised by the tow was indemnity, but the obligation to indemnify can arise only when the indemnitee is under a legal obligation to make payment for its wrong. *The Toledo*, 122 F. 2d 255 (C.A. 2), certiorari denied, 314 U. S. 689. Respondents, as indemnitees, could not be "liable" to themselves and were therefore not entitled to indemnity.

This reading of the words of the provision is reinforced by the accepted guides for applying exculpatory clauses. This Court and others have consistently held that even when a party may validly shift the risks of his negligence to another the contract must be strictly construed against him, and have declared that unless the provisions clearly and unequivocally announce such a purpose they shall not be given that meaning. *Noonan* v. *Bradley*, 9 Wall. 394, 407; *Mostyn* v. *Delaware, L. and W. R. R. Co.*, 160 F. 2d 15, 19 (C.A. 2); *Thompson-Starrett Co.* v. *Otis Elevator Co.*, 271 N. Y. 36.[6] Indeed, if *The Syracuse* and *The Wash Gray* (*supra*, pp. 6-8) did not declare invalid attempts by tugs to divest themselves of responsibility, they can

[6] The clause here should further be strictly construed against the respondents, who were its draftsmen. *Insurance Co.* v. *Slaughter*, 12 Wall. 404.

only be explained as illustrations of the most rigid application of this canon to towage contracts. See also *The Devonshire and St. Winifred*, [1913] P. 13, refusing to hold a tow liable to the tug under a contract similar to that in the instant case.[7]

CONCLUSION

We pointed out in our memorandum in *Bisso* v. *Inland Waterways Corp.*, No. 50, that the three "pilotage clause" cases which will be before the Court present the issues of the validity and effect of these provisions in actions (1) by the tow against the tug (the *Bisso* case), (2) by a third party against the tow (*Boston Metals Co.* v. *S. S. Winding Gulf*, No. 70), and (3) by the tug against the tow (the instant case). The Court thus has the opportunity to render at this term definitive rulings in the three situations which form the great bulk of those involving the widely used "pilotage clause".

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

JULY, 1954.

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[7] *The Syracuse* and *The Wash Gray* indicate that this Court, charged in such large measure with the administration of admiralty law, has always been ready to assume jurisdiction over questions of contract interpretation, when elements of confusion and uncertainty have clouded common or standard contract provisions. See, also, *Calmar Steamship Corp.* v. *Scott*, 345 U. S. 427, 428.

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No. 210

In the Supreme Court of the United States

OCTOBER TERM, 1954

THE UNITED STATES OF AMERICA, AS OWNER OF THE S. S. "CHRISTOPHER GALE," PETITIONER

v.

CHRIS NIELSON, ET AL., CO-PARTNERS TRADING UNDER THE FIRM NAME AND STYLE OF DAUNTLESS TOWING LINE, AS OWNER OF THE TUG "DAUNTLESS #6"

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 106–108) is reported at 112 F. Supp. 730. The *per curiam* opinion of the court of appeals (R. 115), affirming on the opinion of the district court, is reported at 209 F. 2d 958.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1954 (R. 116). The petition for a writ of certiorari was filed on July 13, 1954, the time for filing having been extended to July 14, 1954, by order of Mr. Justice Reed en-

tered May 15, 1954 (R. 116). The petition was granted on October 14, 1954 (R. 117). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

A towage contract between a tugboat company (respondent) and a shipowner (petitioner) provided in substance that a pilot in the general employ of the tugboat company, upon boarding the ship (or tow) for purposes of directing the towage operation, should be deemed the servant of the tow, and that the tug would not be liable for damages resulting from his handling of the tow or from his orders to the tugs. Owing to the negligence of the tug employee, acting as docking pilot and directing tow and tugs, the tow damaged one of respondent's tugs while the tow was being maneuvered into its berth. Relying on the contract, respondent filed a libel against the United States, as shipowner, predicated on the negligence of the docking pilot. The following questions are presented:

1. Whether the above provision is consistent with public policy insofar as it provides for exculpation of the tug.

2. If valid for that purpose, whether it would be consistent with public policy to apply it to the situation where the tug seeks recovery against the tow for acts of negligence committed by the general employee of the tugboat company in the performance of the towage operation.

3. Assuming affirmative answers to the above questions, whether the language of the clause in the instant case may be construed to apply to the situation described in Question 2.

STATEMENT

On April 5, 1946, the Luckenbach Steamship Company, operator of the United States-owned S. S. CHRISTOPHER GALE under a general agency agreement (R. 11), engaged the Dauntless Towing Line to shift that vessel from Hoboken, New Jersey, to a berth on Fifty-Second Street pier in Brooklyn, New York (R. 47). The arrangements were made by telephone pursuant to a working contract which Luckenbach had with Dauntless. Luckenbach was aware of the conditions, including the so-called "pilotage clause" (R. 48), which provided as follows:

> When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tug, their owners, agents, or

> charterers shall be liable for any damage resulting therefrom.

Dauntless determined how many tugs would be used and which tugs would be sent (R. 40, 47–48); it also assigned the docking pilot (R. 38, 51).

On the morning of April 6, 1946, the CHRISTOPHER GALE, assisted by two tugs, the DAUNTLESS #6 and DAUNTLESS #9, arrived without incident at the entrance to its slip in Brooklyn. The docking pilot (who was in the general employ of the Dauntless company) was on the bridge directing the operation (R. 107). At this point, the tugs had been made fast to the GALE by lines, the #6 on the port bow and the #9 on the port quarter (R. 52). Because of an increasing wind and flood tide from starboard, the pilot decided to move his vessel part way into the slip, and rest its port side against the corner of the north pier, with the #6 inside the slip and the #9 outside, and then to breast the GALE across the slip to its berth (R. 53). However, the #6 was unable to hold up the bow of the GALE, entering the slip, and the vessel began to sag down toward the north pier. The starboard anchor of the GALE was dropped, but failed to take hold. The #6 was ordered to come ahead full, but was still unable to hold the ship. At this point, the captain of the #6 signalled his deckhand to slack off the lines, and attempted to extricate his tug by moving forward. The tug was unable to complete the maneuver, however, before it was caught be-

tween the GALE and the corner of the pier, and crushed (R. 31–32, 54).

The Dauntless Towing Line brought a libel against the United States under the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. 741, to recover for the damage to the DAUNTLESS #6 (R. 2–5).[1] The issue was tried on the question of liability alone, and the trial court found that the accident was caused solely through the negligence of the docking pilot of the GALE (who directed the movements of both ship and tugs) "in persisting in his attempt to enter the slip after he knew or should have known that he could not overcome the force of the wind and tide and keep the CHRISTOPHER GALE from sagging down on Pier 1" (R. 109).

Dauntless contended that, by reason of the pilotage clause, this pilot, although in its general employ (R. 109), had become a servant of the GALE, and that the GALE was therefore liable for the damage to the tug resulting from his negligence. The Government contended that the clause purported to do no more than relieve the tug of liability for damages and should not be read as intending to make the tow responsible for injury suffered by the tug. The Government also urged that, if it were so interpreted, it would clearly offend public policy.

[1] A libel against Luckenbach Steamship Company was dismissed on authority of *Cosmopolitan Shipping Company* v. *McAllister*, 337 U. S. 783 (R. 108).

The district court found for the libellant (R. 107–109), and the court of appeals affirmed on the basis of the lower court's opinion (R. 115).

SUMMARY OF ARGUMENT

I

A. Exculpatory clauses, seeking to shift from tug to tow the tug owner's responsibility for the negligence of his employees, have been incorporated in towage contracts for many years. Their status in the courts, however, has long been unclear. On two occasions, in cases involving a "release clause" (*i. e.*, a clause declaring that all risks of the operation should be upon the tow), this Court declared in general terms that the towing vessel must be visited with the consequences of its own negligence. *The Syracuse,* 12 Wall. 167; *Compania de Navigacion Interior* v. *Fireman's Fund Insurance Company* (commonly known as *The Wash Gray*), 277 U. S. 66. In a third case, however, the Court permitted enforcement of a "pilotage clause" (a clause seeking to render the tugboat captain, while aboard the tow, in legal effect the "lent servant" of the tow). *Sun Oil Co.* v. *Dalzell Towing Company,* 287 U. S. 291. While the lower federal courts have, for the most part, assumed that *Sun Oil* broadly licensed the use of exculpatory provisions, the facts are consistent with a much more limited interpretation. In that case, the tugboat captain was actually performing the work

of the ship (piloting her, under her own power, in the open channel) when the mishap (running the vessel aground through an error of navigation) took place. Whether the Court would have reached the same result if an accident had occurred as a result of the tug captain's negligence in directing the performance of towage from the bridge of the tow is uncertain.

B. Congress has not considered the question whether exculpatory provisions in towage contracts should be permitted. Moreover, the policies reflected in Congressional enactments relating to other aspects of water transportation furnish little guidance.

The courts have not generally looked with favor upon contracts exonerating a party from liability for his own negligence and such contracts, where permitted (as they have been in many situations), are always strictly construed against the party seeking exculpation. Whether public policy absolutely forbids enforcement of such a contract depends upon analysis of the relevant factors to determine whether there is gross unfairness between the parties or reason to apprehend serious detriment to the public interest.

So far as fairness between the parties is concerned, it is evident that the size and resources of tugboat companies as a class are not such as to indicate that they are in a position to dominate their patrons. Nonetheless, these companies have considerable bargaining power by virtue of the

strategic position which they occupy. Moreover, it appears that they have followed a parallel course of action and that the patron may find it extremely difficult to secure towing service without acceding to an exculpatory provision.

The fact that the master and crew of the tow will ordinarily be aboard when towing service is provided furnishes little reason for permitting tug exculpation. In the actual performance of the towage operation, which the tugboat company is hired to direct and conduct because of its special know-how, equipment, and capabilities, effective direction and control passes completely into the hands of the tug company's employees.

There is, however, some economic justification for the tug's effort to shift risk. The operation is inherently hazardous and slight negligence may easily result in serious loss. And the value of the tow or its cargo is often highly disproportionate to the value of the tug.

The very hazards of the operation, however, make it especially important that there be no relaxation of that vigilance which the threat of liability encourages. Perhaps, a sufficiently strong sanction against carelessness by the tug company (which is, of course, a threat to personal safety as well as to property) is the great vulnerability of tugs in the event of mishap. It is accordingly of crucial significance, from the standpoint of the policy considerations, that re-

spondent seeks a rule which not only would permit exculpation from liability but would also permit the tug company to recover for its own loss.

Balancing the various considerations, we doubt that the factors weighing against exculpation are so strong and compelling as to require a holding that the industry practice is to be proscribed and exculpatory clauses deemed entirely void. We urge, however, that in no event should a tug company be permitted to recover for its own loss consequent upon the negligence of its own employees in the performance of towage. There is every reason to apprehend that such an extreme departure from the salutary principle that responsibility should accompany control would come close to destroying the incentive to care which the public interest demands.

II

In any case, the language of the contract should not be read as permitting recovery by the tug against the tow for its own damage. As the words of the clause indicate, the intention was that the tug would be free of liability, not saved harmless from its own loss or damage. This view is supported alike by the rule that exculpatory clauses are to be strictly construed against the party seeking to avoid risk and the canon that provisions of a contract are to be strictly construed against the draftsman.

ARGUMENT

I

THE VALIDITY OF EXCULPATORY CLAUSES IN TOWAGE CONTRACTS IS UNSETTLED AND IS SUBJECT TO CONFLICTING POLICY CONSIDERATIONS. IF PERMITTED TO STAND, THEIR EFFECTS SHOULD BE CIRCUMSCRIBED. TO ALLOW A TUGBOAT COMPANY AN AFFIRMATIVE RECOVERY PREDICATED UPON THE NEGLIGENCE OF ITS OWN EMPLOYEE IN DIRECTING A TOWAGE OPERATION IS OBJECTIONABLE

A. LITIGATION OVER EXCULPATORY CLAUSES IN TOWAGE CONTRACTS

Some form of exculpatory clause, purporting to shift to the tow responsibility for the negligence of the employees of the tug or the tug owner,[2] has been a common element of towage contracts in this country, as well as elsewhere. While varying to some degree in their phrasing and conditions, these clauses have generally fallen into two categories. One type is the "release clause," which is direct in its effect and provides that all risks of the operation will be upon the tow. The second type is the "pilotage clause," which has become the more common form since this Court's decision in *Sun Oil Company* v. *Dalzell Towing Company*, 287 U. S. 291. This type of provision is indirect in operation and

[2] To avoid confusion, the word "tug" will be used in this brief—except when referring to other types of towing vessels in specific cases—even though the use of these clauses extends to many vessels acting as towers which are not properly classified as tugs.

seeks to render employees of the tug or tug owner in legal effect "lent servants" of the tow.

The validity of these attempts by tug owners to transfer responsibility for the negligence of their employees to tows has been a source of litigation for over eighty years.[3] In 1870, this Court, in *The Syracuse*, 12 Wall. 167, held that a towing steamer, having been found negligent, was liable for damage to its tow (a canalboat) notwithstanding a contractual provision which stated that the boat was towed "at the risk of her master and owners." The Court declared (12 Wall. at 171):

> * * * if it be true * * * that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected and disaster occurs, the towing boat must be visited with the consequences.

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[3] The first conclusion of law of the District Court in this case (R. 109) apparently recognized that the only possible basis for imposing liability on the CHRISTOPHER GALE for the docking pilot's negligence was the "pilotage clause." This is clearly in accord with the applicable law. *Sturgis* v. *Boyer*, 24 How. 110; *The West Eldara*, 104 F. 2d 670 (C. A. 2).

This declaration failed, however, to settle the issue. A question soon developed as to the basis of the Court's holding: whether the Court had found that the policy of the law required that the towing vessel be forced to bear the responsibility for its own negligence, or had simply found that the disputed clause did not cover the risk of the towing vessel's negligence. Despite the strong language of the opinion, there were considerations which made the case susceptible of a limited interpretation. In the first place, it appears that counsel for the SYRACUSE regarded the question of the vessel's negligence as the crux of the case and did not argue that she was free from liability even if negligent. See *Winslow* v. *Thompson,* 134 Fed. 548, 551 (C. A. 1), and *The Pacific Maru,* 8 F. 2d 166, 171 (S. D. Ga.). Secondly, the law governing towage at the time the case arose was in an uncertain state, and the clause might have been interpreted as intended only to insure that the towing vessel would not be held subject to the absolute liability of a common carrier.[4]

[4] It was not established that a tug was not subject to such a liability until it was so stated in *The Syracuse* opinion itself, and in *The Margaret*, 94 U. S. 494. It was, moreover, not until three years after *The Syracuse* that it was established under federal law that a common carrier could not stipulate against its own fault. *Railroad Company* v. *Lockwood*, 17 Wall. 357. Thus, *New Jersey Steam Navigation Company* v. *Merchants' Bank*, 6 How. 344, had ruled that a

The Second Circuit adopted this limited interpretation of *The Syracuse* in *The Oceanica,* 170 Fed. 893, certiorari denied, 215 U. S. 599. Pointing out that the provision involved in *The Oceanica* had been written after it became certain that a tug's liability extends only to its own negligence and must have been directed at exoneration from such liability, the court held exculpation permissible, a result which it followed in *Ten Eyck* v. *Director General of Railroads,* 267 Fed. 974.

The Ninth Circuit, on the other hand, twice construed *The Syracuse* as proscribing any attempt by a tug to contract against its own negligence. *Alaska Commercial Company* v. *Williams,* 128 Fed. 362; *Mylroie* v. *British Columbia Mills Tug & Barge Company,* 268 Fed. 449, affirmed on other grounds without this question being reached, 259 U. S. 1.

In 1928, this Court decided *Compania de Navigacion Interior* v. *Fireman's Fund Insurance Company,* 277 U. S. 66, commonly known as *The Wash Gray,* in which the towage contract provided that except for the hawser "all other risk and expense" were "to be borne by" the tow, and that the towing vessel was "not responsible in any way for loss or damage to" the tow. The issue was the liability to the tow of its insurers

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common carrier's "release clause," if not directed specifically at negligence, would be read as relieving the carrier from the "insurer's liability" of a common carrier.

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U. S. at 294): "Respondent's [the tugboat company's] responsibility is not to be extended beyond the service that it undertook to perform. It did not furnish pilotage." Whether the Court would have reached the same result if a mishap had occurred as a result of the tug captain's negligence, while aboard the tow, acting as director of the towage operation—the operation which it is the peculiar function of tug companies to perform—is at least open to question.

B. POLICY CONSIDERATIONS BEARING ON THE PERMISSIBILITY OF EXCULPATORY CLAUSES IN TOWAGE CONTRACTS

1. So far as we are aware, the question whether exculpatory clauses in towage contracts should be upheld or condemned has not been considered by Congress. Moreover, the policies reflected in legislation relating to other aspects of water transportation appear indecisive for present purposes.

It is true that as early as 1851 Congress provided for limitations upon the liability of owners of vessels in certain cases, including collisions. Act of March 3, 1851, 9 Stat. 635. The purpose was "to promote the building of ships, and to encourage persons engaged in the business of navigation," *Moore* v. *American Transportation Co.*, 24 How. 1, 39. The policy has subsisted (see 46 U. S. C. 182 *et seq.*) and, since 1886, limitation-of-liability provisions have encompassed all seagoing vessels and all vessels used on lakes or rivers or in inland navigation (Act of June 19,

1886, Sec. 4, 24 Stat. 80). The general tenor of the legislation has been to limit the shipowner's liability, in case of mishap, to the value of his ship and her pending freight (see 46 U. S. C. 183 (a)).

It is arguable that since Congress has enacted provisions which have the general effect, *inter alia*, of limiting the liability of one ship to another,[5] the courts should not countenance an arrangement which goes further, *e. g.*, one which would enable the negligent vessel to avoid liability completely by shifting it to another vessel. While the argument, we think, has some force, it must be conceded that Congress was not focusing upon the problem of two vessels which are working together, by contractual arrangement, in the performance of a specialized task, one of them (the tug) being engaged in the business of servicing the other (the tow). Congress was not addressing itself specifically to the problems of the towing business but to maritime accidents at large.

Congress, of course, has dealt with other types of contractual relationships under maritime law, notably the relationship between vessel and passenger and between vessel and shipper. It has provided that a shipowner may not, by contract, reduce below the statutory ceiling his liability to

[5] As to the applicability of these limitations when a tug's negligence is founded on the acts of its servant acting as pilot of a tow, see discussion in the court of appeals' opinion in *Sun Oil Co.* v. *Dalzell Towing Co.*, 55 F. 2d 63, 65 (C. A. 2).

a passenger for negligence resulting in the latter's personal injury or loss of life (46 U. S. C. 183c; see also 46 U. S. C. 183 (b)). And it has dealt in great detail with the reciprocal rights and liabilities of water carriers and shippers, cutting down on what would otherwise be the common carrier's absolute liability as insurer. Harter Act, 46 U. S. C. 190 *et seq.*; Carriage of Goods by Sea Act, 46 U. S. C. 1300 *et seq.* See *United States* v. *Atlantic Mutual Insurance Co.*, 343 U. S. 236.

It is difficult, however, to draw any inference from Congressional silence on the subject of towage contracts. If it be presumed that Congress has been fully aware of the extent to which exculpatory provisions have been incorporated in towage contracts, it still does not follow that its inaction signifies approval, for one must also presume that it has been equally aware that the status of these provisions in the courts has long been uncertain.

The regulatory authority over water transportation conferred upon the Interstate Commerce Commission by Part III of the Interstate Commerce Act (Transportation Act of 1940, 54 Stat. 898, 929, Section 301 *et seq.*, 49 U. S. C. 901 *et seq.*) embraces towage.[6] *Cornell Steamboat Co.* v.

[6] So far as purely intraharbor operations are concerned, the exercise of jurisdiction under Part III requires a finding that application of the statutory provisions "is necessary to carry out the national transportation policy" (Section 305 (g), 49 U. S. C. 903 (g)).

United States, 321 U. S. 634. And for purposes of that Act towing companies may be common carriers if they hold their services out to the general public. *Id.*, p. 638. But the Act was not "designed * * * to determine the legal status of vessels for all purposes"; its object was "to provide for regulation of the rates and services" of competing media of transportation. *Id.*, p. 637. It is expressly declared (Section 320 (d), 49 U. S. C. 920 (d)) that

> Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part.

2. To say that a towing vessel is not treated by admiralty as a common carrier—a proposition established by *The Syracuse*, 12 Wall. 167, and signifying that such a vessel's liability does not extend beyond its own negligence—is only a starting point. Sound public policy, which in the absence of a controlling legislative declaration must ultimately be determined by this Court in the exercise of its admiralty powers, might nonetheless be deemed to prohibit a towing vessel from stipulating against its own negligence in the conduct of those activities which are within its special competence and which the performance of towage

action. The insistence upon exculpatory clauses appears to be widespread, if not universal.

While no statistics are available to show the precise extent to which these clauses appear in towage contracts, the evidence strongly indicates that it would be very difficult to obtain towage service without agreeing to such a provision. More than fifty of these clauses have been involved in court or arbitration proceedings during the past thirty years. This Court now has before it cases involving similar provisions arising from accidents on the Mississippi River, *Bisso* v. *Inland Waterways Corp.*, No. 50,[9] and off the coast of New England, *Boston Metals Co.* v. *S. S. Winding Gulf*, No. 70.[10] Other cases have arisen on the Great Lakes (*Great Lakes Towing Co.* v. *Bethlehem Transportation Corp.*, 65 F. 2d 543 (C. A. 6)), the southern Atlantic coast (*Calzavaro* v. *Planet Steamship Corp.*, 31 F. 2d 885 (C. A. 4)), and the Pacific (*Mylroie* v. *British Columbia Mills Tug & Barge Co.*, 268 Fed. 449 (C. A. 9), affirmed, 259 U. S. 1). The

[9] A brief *amicus curiae* is being filed in No. 50 by counsel representing eight companies operating harbor or river tugs on the Mississippi River and at New Orleans and Mobile. Each of these companies uses a contract containing exculpatory clauses.

[10] In a connected case, it was found that the pilotage provisions of the contract were in accord with the "Standard Towing Conditions as agreed between the Shipping Federation of Canada and Eastern Canadian Tug-Boat Owners' Association." *Adams* v. *The Peter Moran*, 94 F. Supp. 520, 521 (S. D. N. Y.).

district court stated in this case that the challenged clause was "in common use in and around the New York harbor" (R. 107).[11]

The regulations of the War Shipping Administration relating to contracts of towage further indicate the prevalence of the "pilotage clause," the more so since the Administration was primarily an operator of ships and thus not favored by the clause. In Operations Regulation No. 27, December 29, 1942,[12] and in Supplement No. 1 thereto, February 18, 1944, the Administration gave its General Agents, Agents, and Berth Sub-Agents authority to accept such provisions, and additional supplements indicate that in its "master" contracts with companies in Baltimore and Philadelphia "pilotage clauses" were included. Supplement No. 4, December 16, 1944, Supplement No. 6, May 24, 1945.

There is also reason to believe that the use of some form of exculpatory clause is required by marine underwriters for coverage under standard form towing policies. See, *e. g.*, ***Marine Transit Corp.*** v. ***Northwestern Fire & Marine***

[11] In none of the cases (including the instant case) is there any evidence that the patrons of tugboat companies were offered an option to purchase towage service without acceptance of an exculpatory provision.

[12] This regulation, moreover, indicates apparent unanimity among tug operators in adopting a new clause which provided that if the person ordering towage was not the owner of the vessel, he warranted his authority to bind the owner to the pilotage clause.

who had stipulated that "Any agreement * * * by the insured whereby any right of recovery of the insured against any vessel, person or corporation is released, decreased, transferred or lost, which would, on acceptance of abandonment, or payment of loss by this company, belong to this Company but for such agreement * * * shall render this policy null and void as to the amount of any such loss or damage * * *." Since it was held that the loss of the WASH GRAY was not the result of negligence on the part of the towing vessel, construction of the contract might have been avoided. The Court did not choose this course, but explicitly declared (277 U. S. at 73):

> We do not think that the towing contract has the effect claimed for it by the companies. It did not release the "Freeport" from any loss or damage to the "Wash Gray" due to the negligence of the master or crew of the towing vessel * * *.
>
> The rule laid down by this Court in *The Steamer Syracuse* * * * covers the point.

The opinion quotes the language of *The Syracuse* set out above (p. 11) and concludes (p. 74): "In view of this state of the law, the towing contract here shown was not a fact material to the risk, a concealment of which from the underwriters would injure them or avoid the policy."

Four years later, however, in *Sun Oil Company* v. *Dalzell Towing Company*, 287 U. S. 291,

the Court made clear that its prior rulings did not completely preclude tug owners from shifting to their tows some of the responsibility for the negligence of servants in the general employ of the tug. In that case, the SABINE SUN had run aground in open channel while a tug captain was acting as the vessel's pilot. The vessel was accompanied by tugs as it made its way across the channel but it does not appear that the tugs were playing an active role at the time of the mishap or that the fault was anything but an error of navigation such as might have been made had no tugs been present. The contract contained a so-called "pilotage clause" (before this Court for the first time) which stated:

> When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain becomes the servant of the owners in respect to the giving of orders to any of the tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom.

Holding that the tug owner was exonerated, the Court held (p. 294) that "There is no foundation in this case for the application of the doctrine that common carriers and others under like duty to serve the public according to their ca-

pacity and the terms of their undertaking cannot by any form of agreement secure exemption from liability for loss or damage caused by their own negligence."

Lower court decisions since the *Sun Oil* case seem for the most part to have assumed that this Court gave broad license to tug companies to place upon their tows responsibility for the negligence of the tug's employees. *The Primrose,* 3 F. Supp. 267 (E. D. N. Y.); *The John J. Feeney,* 3 F. Supp. 270 (E. D. N. Y.); *The Melvin and Mary,* 23 F. Supp. 398 (E. D. N. Y.); *The Francis Killian, Jr.,* 26 F. Supp. 323 (E. D. N. Y.); *Dalzell* v. *The New York,* 77 F. Supp. 793 (E. D. N. Y.); *Mathiasen Shipping Company* v. *United States,* 87 F. Supp. 216 (S. D. N. Y.). But see *Great Lakes Towing Co.* v. *American Steamship Co.,* 165 F. 2d 368 (C. A. 6), certiorari denied, 333 U. S. 881; *The Walter G. Hoagland,* 184 F. 2d 530 (C. A. 6); *Great Lakes Towing Co.* v. *Bethlehem Transportation Corp.,* 65 F. 2d 543 (C. A. 6); *Petterson Lighterage & Towing Corp.* v. *The J. Raymond Russell,* 87 F. Supp. 267 (S. D. N. Y.). Indeed, implicit in the decision of the Fifth Circuit in *Bisso* v. *Inland Waterways Corp.,* 211 F. 2d 401 (C. A. 5), No. 50, this Term, is an assumption that *The Syracuse* and *The Wash Gray* are no longer controlling. This assumption has now been made explicit by the Second Circuit in *North River Barge Line* v. *Chile S. S. Company,* 213 F. 2d 882.

It is not necessary, however, to suppose that the Court intended, in *Sun Oil*, to overrule the apparent implication of its earlier statements, *i. e.*, that there is danger in permitting a towing vessel to stipulate against liability for its own acts of negligence. There were distinguishing factors in *Sun Oil*. Superficially, there is the fact that the clause was different from those previously before the Court. It stipulated only against the negligence of a tug's servant aboard the tow and thus left the tug liable for the negligence of those remaining on board the tug. But that, standing alone, would hardly seem a factor of critical importance since the clause (like that in the instant case) explicitly sought to protect against the negligence of that servant "in respect to the giving of orders to any of the tugs engaged in the towage service." That is to say, it sought to exonerate the tug company for the negligence of the very man who would be in charge of the entire flotilla and most directly responsible for the safety of tow, tugs, and all others who might be concerned. The fact that the clause was a "pilotage clause" is certainly significant, however, when one considers, additionally, the other facts of the case—that the mishap which occurred bore no relation to the performance or direction of towage but was simply the result of the tug captain's faulty navigation of the tow while serving as its pilot in the open channel. Thus, the opinion stated (287

necessarily entails. Or, short of that, it might be held to require the imposition of limitations upon the enforceability of such agreements.

Contracts to limit the liability of an enterprise for its own acts of negligence have never been favored, and where permitted, as they have been by many courts in a wide variety of situations, the effects have been closely restricted by application of the rule that such agreements are to be strictly construed against the party seeking exculpation.[7]

When it appears, however, that the agreement is explicit, that the enterprise contracting for exculpation does not fall within a special category, such as common carrier or public utility, and that there is no clear indication of gross unfairness between the parties or of detriment to the public interest, the courts have generally permitted enforcement of the bargain. For an extensive collection of the many cases touching the subject, see Note, *Limiting Liability for Own Negligence*, 175 A. L. R. 8. See, also, Note, *The Significance of Comparative Bargaining Power in the Law of Exculpation*, 37 Col. L. Rev. 248; 6 Williston, *Contracts* (1938 ed.), Sections 1751B, 1825. The dangers which are presumed to be present, as a matter of law, when the party seeking to limit liability is a common carrier or public utility may be apprehended in fact in other circumstances.

[7] As to this rule of strict construction, see discussion in Point II, p. 31, ~~*supra*~~ *infra*.

Inevitably, this involves questions of judgment, and it is suggestive of the difficulty of the problem that the courts of various jurisdictions have reached a wide variety of results in closely comparable situations. One finds, for example, considerable disagreement in the cases as to whether such enterprises as warehouses, parking lots, cotton compresses, and gasoline distributing companies should be permitted to contract with their respective patrons for limitations on liability. See Notes cited *supra.*

We shall examine exculpatory provisions in towage contracts, first, from the standpoint of the parties to such agreements and, second, from the standpoint of the broader public interests involved.

Obviously, tugboat companies as a class do not have size and resources which would lead one to infer that they are in a position to dominate the owners of steamships or barges.[8] Nonetheless, they occupy a strategic position. The shipowner depends on the tug for performance of a vital function, and the strength of the tug's bargaining position is, no doubt, greatly enhanced by the fact that the tugboat companies have apparently followed a parallel course of

[8] The presumed lack of the consensual element was an important factor in the decisions of this Court striking down release clauses inserted by common carriers. *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 379 (rail carriers); *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 441 (water carriers).

Insurance Co., 67 F. 2d 544 (C. A. 2); *The Massmar*, 1942 A. M. C. 230; *The Jason*, 1942 A. M. C. 1358; *Bee Line Transportation Co.* v. *Connecticut Fire Insurance Co.*, 76 F. 2d 759 (C. A. 2).

Another factor is the matter of control. It may be suggested that the owner of a tow retains a much greater measure of control over his property than the shipper who entrusts a crate to a railroad or a warehouse and that exculpation for damage is for that reason inoffensive (or less offensive) here. It is true that the master, officers, and crew of a steamship will generally be at their stations when towing service is provided and that the master has power to relieve the pilot. But this cannot obscure the fact that actual control of a towage operation necessarily rests in the hands of the employees of the tug company. That company's representative acts as pilot of the tow and as director of the operation because he is presumed to be familiar with the harbor, its docks, its waters, and its tides.[13] And it is he who is obliged to make the split-second decisions involved in maneuvering the vessels at close quarters.[14]

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[13] As indicated in the Statement, *supra*, p. 4, the mishap in the instant case occurred while the ship was actually being docked and while the docking pilot was in full control of all three vessels.

[14] The specialized knowledge of the tug operator's employees is illustrated by the case at bar. The docking pilot knew that the DAUNTLESS #6 developed fewer horsepower than the average tug doing transport work in New York

A third factor is economic justification, and here, it must be admitted, there are certain arguments in favor of exculpation which are not without force. Towage in all forms is an operation fraught with risk. Two or more vessels must move under joint control and the chances of error are multiplied. The ships maneuver at close quarters with each other and often with other vessels. Because of the slow speeds usually kept, steerageway may be lost or the vessels may be unduly affected by wind and tide. For these and other reasons the danger of loss is great, and the occasions for large liability from slight negligence are many. Unless exoneration is permitted, the tugs must bear that liability if the negligence is theirs, as it most often would be. Yet the value of the tow or its cargo is often highly disproportionate to the value of the tug. Even non-crippling damage to a large liner might exhaust the value of the tug at fault.[15]

The hazards of towage raise other considerations—considerations which bear directly upon the public interest as distinguished from the nar-

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harbor (R. 40, 46). The master of the GALE had no knowledge of that tug's capacities (R. 104). While it was held below and is not questioned here that the #6 was adequate for her assignment, the fact remains that a more powerful vessel might have saved herself.

[15] It is not clear, moreover, that in all circumstances the tug's value would represent the limit of its liability. See opinion of the court of appeals in *Sun Oil Co.* v. *Dalzell Towing Co.*, 55 F. 2d 63, 65 (C. A. 2).

rower interests of the contracting parties. The risks of personal injury and loss of life, both to persons aboard the tow and tugs and to others, are substantial. As Mr. Justice Frankfurter recently stated (*United States* v. *Atlantic Mutual Insurance Co.*, 343 U. S. at 244, dissenting opinion), the underlying premise of the established doctrine that courts will not approve a stipulation against negligence by a common carrier is that "such an agreement, if enforced, would tend to relax the vigilance and care in seamanship which the threat of liability encouraged."[16] Plainly, the reason of the rule is no less applicable to tugs, upon whose skill and care the welfare of a passenger ship's entire complement may depend, than it is to other vessels which admiralty has denominated "common carriers."

But there is this to be added. In the performance of joint tug-tow operations, the tug and the tug's personnel are highly vulnerable in the event of mishap. This furnishes a measure of assurance that exculpation from liability of tug to tow would not be an open invitation to carelessness.

In the instant case, however, the tug is not seeking mere exculpation but affirmative recovery.

[16] As to the "general rule of law that common carriers cannot stipulate for immunity from their own or their agents' negligence" (opinion of the Court, 343 U. S. at 239), there was, of course, no difference between the majority and the dissenters.

It would use the pilotage clause not merely as a shield but as a sword. Its position is that the tow must pay the tug for the damage resulting to the tug from the negligence of the tug company's employee serving as docking pilot. If release clauses may be given such effect, they will undercut the sanction against negligence which remains even when the tug is relieved from claims of the tow: the possibility of damage to herself.

3. Balancing the various considerations discussed above, we think it doubtful that the indications of possible unfairness or of detriment to the public are sufficiently clear and compelling to require the Court to override completely the industry practice of including exculpatory provisions in towage contracts and to declare such provisions wholly void as against public policy. We urge, however, that it would be objectionable to permit the tugboat company to impose upon the tow, as is sought here, a duty to pay for the damage suffered by the tug itself. If the tow is made the complete insurer of the operation which the tugboat company effectively directs and controls, the latter's incentive to care will be largely sterilized. In the case of the towing industry, which is hazardous and affected with a public interest, such a result, in our view, would exceed reasonable limits and would offend public policy.

II

THE LANGUAGE OF THE CONTRACT SHOULD NOT IN ANY EVENT BE CONSTRUED TO PERMIT RECOVERY BY THE TUG AGAINST THE TOW FOR ITS OWN DAMAGE

The pilotage clause in the instant case does not state merely that the pilot, on boarding the tow, becomes the servant of the tow's owners. It goes on to state the consequences which this declared change of relationship is intended to have: "And neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents, or charterers shall be *liable* for any damage resulting therefrom" (emphasis added). Unless this last phrase is to be interpreted as mere surplusage, it must be assumed to modify the preceding words. It follows that no intention to charge the tow with damage suffered by the tug is established by the contract. The clause does not say that the tug company shall be saved harmless or free from any loss; it provides only that the company shall be free from liability.[17] What was promised by the tow was indemnity for such liability, and the obligation to indemnify can arise only when

[17] It can scarcely be argued that the construction which respondent urges was a common understanding of the trade, for it appears that the issue was first raised in the courts in 1948, *i. e.*, after the date of the contract in the instant case. See *Dalzell* v. *The New York*, 77 F. Supp. 793 (E. D. N. Y.).

the indemnitee is under a legal obligation to make payment for a wrong. *The Toledo,* 122 F. 2d 255 (C. A. 2), certiorari denied, 314 U. S. 689. Respondent, as indemnitee, could not be liable to itself and was therefore not entitled to indemnity.

This view of the clause is likewise supported by canons of construction laid down by this Court. Even when a party may validly shift the risks of his negligence to another, the contract must be strictly construed against him, and unless the provisions clearly and unequivocally announce such a purpose they shall not be given that meaning. *Noonan* v. *Bradley,* 9 Wall. 394, 407.[18] And a clause should be strictly construed against its draftsman, in this case the respondent. *Insurance Company* v. *Slaughter,* 12 Wall. 404. As we have previously pointed out (*supra,* pp. 11–14), *The Syracuse* and *The Wash Gray,* if not interpreted as invalidating all attempts by tugs to divest themselves of responsibility, can only be explained as illustrations of the most rigid application of this canon to towage contracts. See also *The Devonshire and St. Winifred,* [1913] P. 13.

Construction of the contract thus fully supports that result which alone appears consistent with sound public policy. See *supra,* p. 29.

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[18] See, also, *Doughnut Machine Corp.* v. *Bibbey,* 65 F. 2d 634 (C. A. 1); *Fairfax Gas & Supply Co.* v. *Hadary,* 151 F. 2d 939 (C. A. 4); *Halliburton Oil Well Cementing Co.* v. *Paulk,* 189 F. 2d 79 (C. A. 5).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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DECEMBER 1954.

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Supreme Court of the United States

No. 210

THE UNITED STATES OF AMERICA, as Owner of the S/S "CHRISTOPHER GALE",

Petitioner,

against

CHRIS NIELSON, et al., Co-partners Trading Under the Firm Name and Style of DAUNTLESS TOWING LINE, as Owner of the Tug "DAUNTLESS No. 6",

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In petitioner's Question 1 the Government refers to "damage to the tug incurred through *the negligence of the tug owner's own employee* in the course of the towing operation". This begs the question for under the terms of the Pilotage Clause involved in this case, the Government specifically agreed that the pilot "becomes the servant of the owners of the vessel assisted" and that "neither those furnishing the tugs . . . . or their owners . . . . shall be liable for *any damage* resulting therefrom." (Emphasis supplied.)

When the Government itself fixed the rates for towage services with the towboat owners it included the Pilotage Clause in consideration of the lower rates obtained by inclusion of that Clause.

We submit that it is well settled that this form of Pilotage Clause governed relations between the Government as owner of the *Christopher Gale*, the licensed pilot who was on the ship in charge of her maneuvers, and the tugs which were assisting in the docking operations.

See:

Moran Towing & Transportation Co., Inc. v. *Navigazione Libera Triestina S. A.*, 2nd Cir. 92 Fed. 2d 37;
Sun Oil Co. v. *Dalzell Towing Co.*, 287 U. S. 291;
Dalzell v. *The New York*, 77 Fed. Supp. 793;
Mathiasen Towing Co. v. *U. S. A.*, 87 F. Supp. 216.

In the *Mathiasen* case, *supra*, the facts were almost on all fours with those of the instant case, and one of the towing tugs was damaged. Judge KENNEDY points out at page 218:

> "The fallacy underlying respondent's position is that it seeks to apply to a case of liability in rem the principles which would govern personal liability, and *it ignores the effect of the pilotage clause. There was no reservation in the standard pilotage clause in effect at the time of this disaster under which the towage company waived any rights which a third party would have.* And the effect of the pilotage clause is much the same as if, until the completion of the operation, the docking master had been discharged by the tower and had entered the service of the tow." (Emphasis supplied.)

The same clause was under consideration in the case of *Dalzell* v. *The New York*, *supra*. In the course of the Court's opinion at page 795 it was stated:

> "Nor can any fault, of course, be ascribed to the tug *Lloyd Dalzell*. She was under orders from those in command of the Christian Holm (the steamer which was being assisted). The pilotage clause of the towage contract imposed responsibility on the owner of the vessel which was assisted by the tug. That Romano (the pilot who was on the bridge of the ship) was in the general employ of the libellant can-

to have contracted for the docking assistance of the *Christopher Gale* with full knowledge of the legal effect of that clause.

2. The pilotage clause has been held not in violation of public policy.

The petitioner seeks to avoid its agreement as to the employment of the pilot by arguing that the "pilotage clause" is against public policy. It seeks to avoid the Supreme Court's decision on this point (in *Sun Oil Co. v. Dalzell*, 287 U. S. 291) by attempting to make a distinction between pilotage (as distinguished from a tug assisting operation) of the vessel from one point to another. It should be noted that in the *Sun* case "respondent sent tugs to take her through waters leading to New York Bay and to a dock at Bergen Point, New Jersey" (p. 293). The Court then said at bottom of page 293, "Her master, officers and crew were at their stations, and her propelling power and steering apparatus were used to bring her to *destination*. And if the pilotage clause is valid, the tug captains *while on board* the tanker and respectively acting as her *pilot* were for that time the servants of petitioner (the ship owner) and the respondent may not be held responsible for any act or omission of theirs during the period of that service." (Emphasis supplied.)

Thus it is clear that in the *Sun* case there was no such distinction made by the Supreme Court as the petitioner contends but the court gave a broad application of the obvious meaning of the agreement whereby the ship owner obtained the services of the pilot. The Court further on page 294 specifically held that the "pilotage clause" did not violate public policy, quoting from *Santa Fe P. and P. R. Co. v. Grant Bros. Constr. Co.*, 228 U. S. 177, 178:

> "There is no rule of public policy which denies effect to their expressed intention, but on the con-

not relieve the impleaded respondent of liability" (citing cases).

We submit that the cases cited by the petitioner at pages 5, 6, 7 and 8 of its brief show no reason to grant certiorari but rather a situation where the law is uniformly well settled. Petitioner argues that the decision in *The Syracuse*, 12 Wall. 167 "invalidated any attempt by a towing vessel *to contract against its own negligence.*" (Emphasis supplied.) The instant case is not one of a tug contracting against its own negligence, but of a tug owner contracting against a pilot's negligence. The record is devoid of any proof of tug's negligence, hence Government is asking certiorari on an issue and factual situation not involved in the case.

It also cites as authority for its contentions *The Wash Gray*, 277 U. S. 66, which is a case of an insured suing its underwriters. There the real points at issue were the questions of the seaworthiness of the vessel, and whether the *Wash Gray* sank from a peril of the sea covered by her insurance.

In Question 2 the petitioner argues that the Pilotage Clause is opposed to public policy and hence invalid.

Petitioner seeks to avoid its agreement as to the employment of the pilot by arguing that the "pilotage clause" is against public policy. It seeks to avoid the Supreme Court's decision on this point (in *Sun Oil Co.* v. *Dalzell*, 287 U. S. 291) by attempting to make a distinction between "pilotage (as distinguished from a tug assisting operation) of the vessel from one point to another". It should be noted that in the *Sun* case "respondent sent tugs to take her through waters leading to Newark Bay and to a dock at Bergen Point, New Jersey" (p. 292). The court then said at bottom of page 293, "Her master, officers and crew were at their stations, and her propelling power and steering apparatus were used to bring her to *destination*. And

> trary as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made."

In *Bisso* v. *Inland Waterways Corp.*, 114 Fed. Supp. 713, the Court in discussing the *Sun Oil Co.* v. *Dalzell, supra,* said at page 715:

> "In so deciding the Supreme Court said that the validity of the clause could not be reasonably doubted, that no rule of public policy makes invalid a release clause even as to negligence, and that the highest public policy is found in the enforcement of the contract as it was written."

Further at page 715 the Court wrote:

> "Therefore since the contract of towage is not so affected with a public interest as to make a release from liability clause against public policy and since the highest public policy is found in the enforcement of a contract as it is written, there would seem to be no reason why such clause should not be valid and enforcible even as to the negligence of the tug, provided the agreement of the parties on this point is clear and unequivocal."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

ANTHONY V. LYNCH, JR.,
Proctor for Respondent.

of Counsel,
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January, 1955.

if the pilotage clause is valid, the tug captains *while on board* the tanker and respectively acting as her *pilot* were for that time the servants of petitioner (the ship owner) and the respondent may not be held responsible for any act or omission of theirs during the period of that service." (Emphasis supplied.)

Thus it is clear that in the *Sun* case there was no such distinction made by the Supreme Court as the petitioner contends but the court gave a broad application of the obvious meaning of the agreement whereby the shipowner obtained the services of the pilot. The court further on page 294 specifically held that the "pilotage clause" did not violate public policy, quoting from *Santa Fe P. and P. R. Co.* v. *Grant Bros. Constr. Co.*, 228 U. S. 177, 178:

> "There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made."

In *Bisso* v. *Inland Waterways Corp.*, 114 Fed. Supp. 713, the court in discussing the *Sun Oil Co.* v. *Dalzell, supra,* said at page 715:

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> and enforcible even as to the negligence of the tug, provided the agreement of the parties on this point is clear and unequivocal."

It is respectfully submitted that the petition for certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 210

THE UNITED STATES OF AMERICA, as owner of the S. S. "CHRISTOPHER GALE,"

Petitioner,

vs.

CHRIS NIELSON, et al., co-partners trading under the firm name and style of DAUNTLESS TOWING LINE, as owner of the Tug "DAUNTLESS No. 6."

BRIEF FOR RESPONDENT NIELSON

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BRIEF FOR RESPONDENT NIELSON

OPINIONS BELOW

The opinion of the District Court (R. 106-108) is reported at 112 F. Supp. 730. The per curiam opinion of the Court of Appeals (R. 115) affirming the opinion of the District Court, is reported at 209 F. 2d 958.

STATEMENT

Respondent adopts the statement of facts set forth in petitioner's brief at pages 3, 4 and 5 but for convenient reference reprints the pilotage clause.

> "When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in

respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents, or charterers shall be liable for any damage resulting therefrom."

QUESTIONS PRESENTED

1. Whether the language of the pilotage clause permits the respondent, owner of one of the assisting tugs, to recover for damage to his tug caused by the negligence of the docking pilot, a lent servant of the tow.

Under the terms of the pilotage clause involved in this case, the Government specifically agreed that the pilot "becomes the servant of the owners of the vessel assisted" and that "neither those furnishing the tugs . . . or their owners . . . shall be liable for *any damage* resulting therefrom." (Emphasis supplied.)

When the Government itself fixed the rates for towage services with the towboat owners it included the pilotage clause in consideration of the lower rates obtained by inclusion of that clause.

We submit that it is well settled that this form of pilotage clause governed relations between the Government as owner of the *Christopher Gale*, the licensed pilot who was on the ship in charge of her maneuvers, and the tugs which were assisting in the docking operations.

See:

Moran Towing & Transportation Co., Inc. v. *Navigazione Libera Triestina S.A.*, 92 Fed. 2d 37 (C. C. A. 2);

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> "The fallacy underlying respondent's position is that it seeks to apply to a case of liability in rem the principles which would govern personal liability, and *it ignores the effect of the pilotage clause. There was no reservation in the standard pilotage clause in effect at the time of this disaster under which the towage company waived any rights which a third party would have.* And the effect of the pilotage clause is much the same as if, until the completion of the operation, the docking master had been discharged by the tower and had entered the service of the tow." (Emphasis supplied.)

The same clause was under consideration in the case of *Dalzell* v. *The New York, supra.* In the course of the Court's opinion at page 795 it was stated:

> "Nor can any fault, of course, be ascribed to the tug *Lloyd Dalzell.* She was under orders from those in command of the Christian Holm (the steamer which was being assisted). The pilotage clause of the towage contract imposed responsibility on the owner of the vessel which was assisted by the tug. That Romano (the pilot who was on the bridge of the ship) was in the general employ of the libellant cannot relieve the impleaded respondent of liability" (citing cases).

In note 11 at the bottom of page 25 of petitioner's brief it is stated

> "In none of the cases (including the instant case) is there any evidence that the patrons of tugboat companies were offered an option to purchase towage service without acceptance of an exculpatory provision."

Nor is there any evidence that the United States in making its towage contracts asked for a contract from

which the pilotage clause was to be deleted. It continuously operated under the pilotage clause and admits at page 28 of its brief

> "In the performance of joint tug-tow operations, the tug and the tug's personnel are highly vulnerable in the event of mishap. This furnishes a measure of assurance that exculpation from liability of tug to tow would not be an open invitation to carelessness."

Petitioner separates from the pilotage clause, which it quotes at page 30 of its brief, the last phrase "Neither those furnishing the tugs . . . their owners . . . shall be liable for any damage", and contends that the intention of the parties was only to shield the towing company from any possible liability to others. Petitioner has produced no evidence of any kind to show that the parties had such intention in mind when the agreement was made. Petitioner has not cited any authority which would support such a strained and narrow construction, and such a construction not only does violence to the terms of the agreement itself, but gives no consideration whatever to the decided cases on this pilotage clause.

Petitioner's repeated references to pilot Nielson as the "general servant" and "general employee" of the towing company cannot overcome the fact that the agreement clearly states that "it is understood and agreed that such tugboat captain or licensed pilot becomes the servant of the owner of the vessel assisted." This is what the parties agreed to and this is what the court below found (Conclusion of Law 1, R. 109). The parties having agreed that the pilot was to be the servant of the ship owner, the ship is responsible for his negligent acts. There is no reservation in this pilotage clause whereby the towing company waived its rights to sue the ship for the negligent acts of the ship owner's servants.

In *The Margaret A. Moran*, 57 F. 2d 1943 (C. C. A. 2),

this Court passed on this phase of legal relationship between ship and towing company when tugs are supplied to assist in the docking of the ship under a "Pilotage Clause", identical with the clause in the contract between petitioner and respondent herein, in the following words: "By reason of the terms of the pilotage clause, when the master of the *Moran* navigated the steam vessel under her own propelling power, he became the servant of the owner of the vessel with respect to giving orders to any of the tugs engaged in the towage service and with respect to handling the vessel, and the tugs were thereupon released from faults or acts of negligence of the master of the *Moran*" (p. 144).

In *Moran Towing & T. Co.* v. *Navigazione Libera Triestina, S.A.*, 92 F. 2d 37 (C. C. A. 2) the Court used the following language in describing the legal effect of the pilotage clause: "In the present case N. L. T., by agreeing with Moran that the tugmaster should become its servant, in effect undertook to perform a maritime service and to indemnify Moran for *any damage sustained* by the tugmaster's negligence" (p. 38); "to indemnify is to make good a loss," *The Captaine Faure*, 10 F. 2d 950, 954, 2 C. C. A.

Petitioner citing *The Toledo*, 122 F. 2d 255 (C. C. A. 2) attempts to argue that the pilotage clause indemnity provisions cannot come into effect until Dauntless is held actually liable for the negligence of Nielson (Petitioner's Brief, p. 31). In the *Toledo* case the Court refused to enforce the indemnity provision of the charter against the ship owner because it found that the charterer, who had settled the claim, was a volunteer and could not have been legally required to pay the claim.

It is therefore abundantly clear that the interpretation put on the pilotage clause by the District Court Judge is amply supported by decisions in the Supreme Court and in the Court of Appeals, and petitioner must be presumed